



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

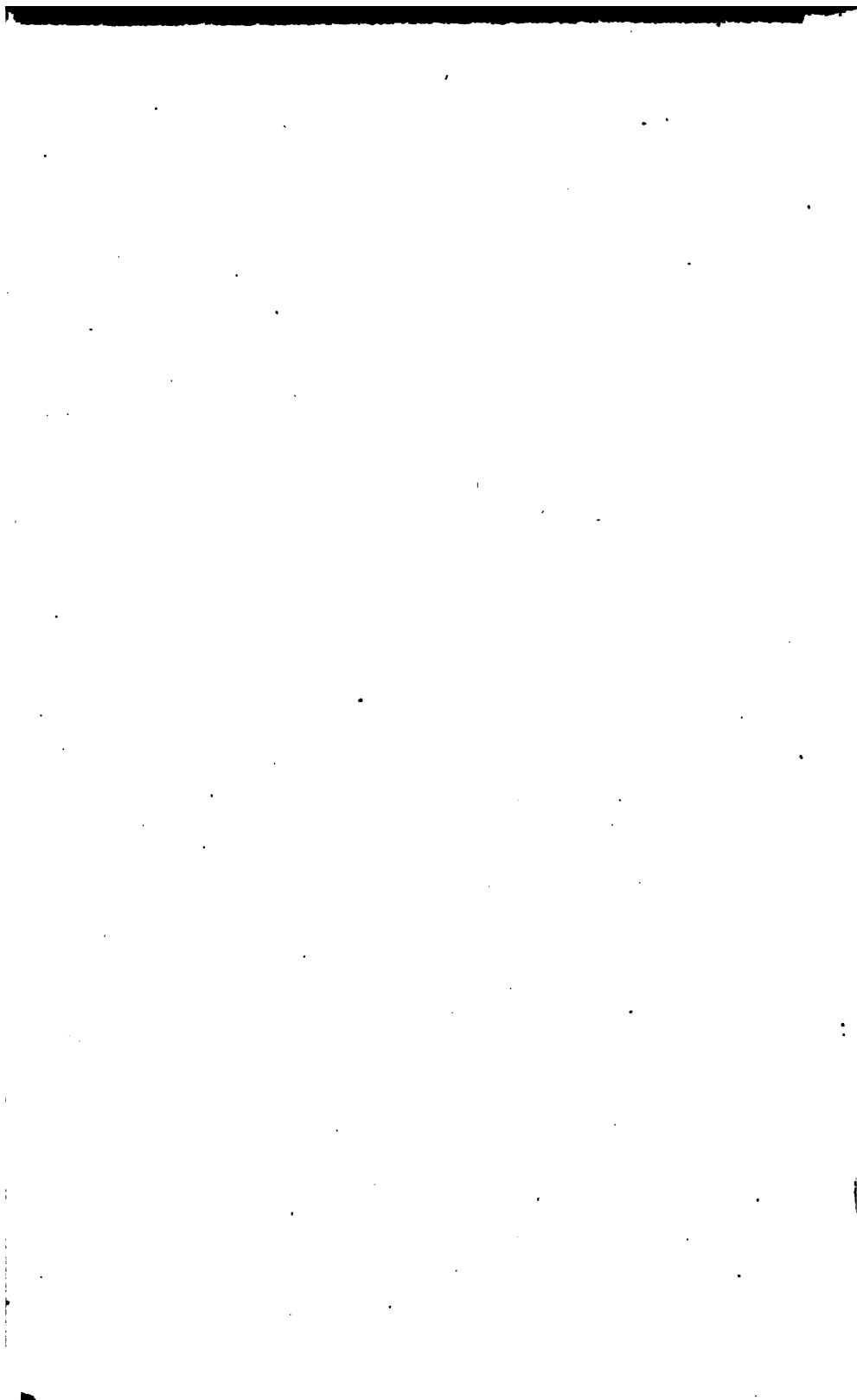
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

***LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.***







REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland,

AND IN THE
HIGH COURT OF CHANCERY OF MARYLAND,

FROM
FIRST HARRIS & McHENRY'S REPORTS TO FIRST
MARYLAND REPORTS.

ANNOTATED BY
WILLIAM T. BRANTLEY,
OF THE BALTIMORE BAR.

VOLUME XV.
CONTAINING THE SECOND VOLUME OF GILL & JOHNSON'S REPORTS.

BALTIMORE:
M. CURLANDER,
LAW BOOKSELLER, PUBLISHER AND IMPORTER.
1884.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

References in the notes to preceding volumes of Maryland Reports are made to the pages of this edition.

The Index and Table of Cases in each volume of this series after 1 H. & J. have been prepared by Mr. W. H. BRUNE, JR., of the Baltimore Bar.

This volume, containing cases determined in the Court of Appeals of Maryland in 1829-30, and reported by Richard W. Gill, Attorney-at-Law, and John Johnson, Clerk of the Court of Appeals, was first published at Baltimore, by Fielding Lucas, Jr., in 1831.

95147

BALTIMORE:
WM. K. BOYLE & SON,
PRINTERS.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, Judge.
Hon. JOHN STEPHEN, Judge.
Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.

COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

COUNTY COURTS.

FIRST JUDICIAL DISTRICT.

Saint Mary's, Charles and Prince George's Counties.

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSBY PLATER, Associate Judge.

SECOND JUDICIAL DISTRICT.

Cecil, Kent, Queen Anne's and Talbot Counties.

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. PHILEMON B. HOPPER, " "

THIRD JUDICIAL DISTRICT.

Calvert, Anne Arundel and Montgomery Counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, " "

NAMES OF JUDGES.—2 G. & J.

FOURTH JUDICIAL DISTRICT.

Caroline, Dorchester, Somerset and Worcester Counties.

Hon. WILLIAM BOND MARTIN, Chief Judge.

Hon. ARA SPENCE, Associate Judge.

Hon. WILLIAM TINGLE “ “

FIFTH JUDICIAL DISTRICT.

Frederick, Washington and Allegany Counties.

Hon. JOHN BUCHANAN, Chief Judge.

Hon. ABRAHAM SHRIVER, Associate Judge.

Hon. THOMAS BUCHANAN, “ “

SIXTH JUDICIAL DISTRICT.

Baltimore and Harford Counties.

Hon. STEVENSON ARCHER, Chief Judge.

Hon. CHARLES W. HANSON, Associate Judge.

Hon. THOMAS KELL, “ “

BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. WILLIAM MCMECHEN, Associate Judge.

Hon. ALEXANDER NISBET, “ “

ATTORNEY-GENERAL.

ROGER B. TANEY, Esquire.

TABLE OF CASES.

REPORTED IN 2 GILL AND JOHNSON'S REPORTS.

References are to top pages.

Aldridge vs. Weems.....	22
Allen <i>ats.</i> Williamson..	210
Allender vs. Riston.....	52
Allegre <i>ats.</i> Chesapeake Ins. Co.....	99
Allegre vs. Maryland Ins. Co.....	86
Baltimore Fire Ins. Co. <i>ats.</i> Kemp.....	67
Barger vs. Collins.....	248
Barker <i>ats.</i> State.....	152
Barney <i>ats.</i> Davis.....	281
Barton <i>ats.</i> Purviance.....	191
Beall <i>ats.</i> Wells.....	278
Beall <i>ats.</i> Wells.....	284
Boyd <i>ats.</i> State.....	228
Brown <i>ats.</i> Jessop.....	245
Brundige vs. Poor.....	1
Causten <i>ats.</i> Kalkman.....	218
Causten <i>ats.</i> Stiles.....	29
Chapman <i>ats.</i> Morris.....	175
Chase <i>ats.</i> Mayor, &c. of Baltimore...	227
Chesapeake Ins. Co. vs. Allegre....	99
Claggett <i>ats.</i> Gibbs.....	8
Collins <i>ats.</i> Barger.....	248
Davis vs. Barney.....	281
Davis vs. Leab....	186
Dent <i>ats.</i> Edelen.....	112
Drury <i>ats.</i> Simmons.....	19
Eastburn <i>ats.</i> Shilknecht.....	71
Edelen vs. Dent.....	112

Gibbs <i>vs.</i> Clagett.....	8
Gittings <i>ats.</i> Pennington.....	122
Glenn <i>vs.</i> Smith.....	296
Glenn <i>vs.</i> Von Kapff.....	88
Griffith <i>ats.</i> Keplinger.....	182
Grimes <i>ats.</i> McCauley.....	194
Gwynn <i>vs.</i> Jones.....	104
Gwynn <i>vs.</i> Thomas.....	254
 Hamilton <i>vs.</i> Warfield.....	 291
Hammond <i>vs.</i> Stier.....	50
Harwood <i>ats.</i> Watkins.....	189
 Iglehart <i>vs.</i> State.....	 146
 Jessop <i>vs.</i> Brown.....	 245
Jones <i>ats.</i> Gwynn.....	104
 Kalkman <i>vs.</i> Causten.....	 218
Karthauss <i>vs.</i> Owings.....	261
Kemp <i>vs.</i> Baltimore Fire Ins. Co.....	67
Keplinger <i>vs.</i> Griffith.....	182
 Leab <i>ats.</i> Davis.....	 186
Lyles <i>ats.</i> Sprigg.....	270
 Maryland Ins. Co. <i>ats.</i> Allegre.....	 86
Mayor, &c. of Baltimore <i>vs.</i> Chase.....	227
Morris <i>vs.</i> Chapman.....	175
McCauley <i>vs.</i> Grimes.....	194
Mundell <i>vs.</i> Perry.....	115
 Owings <i>ats.</i> Karthaus.....	 261
 Pennington <i>vs.</i> Gittings.....	 122
Perry <i>ats.</i> Mundell.....	115
Planters' Bank <i>vs.</i> Sellman.....	143
Plowden <i>ats.</i> Turner.....	276
Poor <i>ats.</i> Brundige.....	1
Price <i>vs.</i> Tyson.....	288
Purviance <i>vs.</i> Barton.....	191
 Raborg <i>ats.</i> Rogers.....	 38
Riston <i>ats.</i> Allender.....	52
Rogers <i>vs.</i> Raborg.....	33
Rogers <i>vs.</i> Waters.....	40

TABLE OF CASES.—2 G. & J.

vii

Scribner <i>ats.</i> State.....	152
Sellman <i>ats.</i> Planters Bank.....	148
Shilknecht <i>vs.</i> Eastburn.....	71
Siemer <i>vs.</i> Siemer.....	62
Simmons <i>vs.</i> Drury.....	19
Smith <i>ats.</i> Glenn.....	296
Sprigg <i>vs.</i> Lylea.....	270
State <i>vs.</i> Barker.....	152
State <i>vs.</i> Boyd.....	228
State <i>ats.</i> Iglehart.....	146
State <i>vs.</i> Scribner.....	152
State <i>vs.</i> Walsh.....	246
State <i>ats.</i> Watkins.....	186
State <i>vs.</i> Wayman.....	156
Stier <i>ats.</i> Hammond.....	50
Stiles <i>vs.</i> Causten.....	29
Stockett <i>vs.</i> Watkins.....	199
Stoddert <i>vs.</i> Vestry, &c.....	140
Thomas <i>ats.</i> Gwynn.....	254
Turner <i>vs.</i> Plowden.....	276
Tyson <i>ats.</i> Price.....	288
Union Bank <i>ats.</i> Winchester.....	45
Union Bank <i>ats.</i> Winchester.....	48
Vestry, &c. <i>ats.</i> Stoddert.....	140
Von Kapff <i>ats.</i> Glenn.....	83
Walsh <i>ats.</i> State.....	246
Warfield <i>ats.</i> Hamilton.....	291
Waters <i>ats.</i> Rogers.....	40
Watkins <i>vs.</i> Harwood.....	189
Watkins <i>vs.</i> State.....	186
Watkins <i>ats.</i> Stockett.....	199
Wayman <i>ats.</i> State.....	156
Weems <i>ats.</i> Aldridge.....	22
Wells <i>vs.</i> Beall.....	278
Wells <i>vs.</i> Beall.....	284
Williamson <i>vs.</i> Allen.....	210
Winchester <i>vs.</i> Union Bank.....	45
Winchester <i>vs.</i> Union Bank.....	48

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

DECEMBER TERM, 1829.

* BRUNDIGE *et al.* vs. POOR *et ux.*

I

A *feme covert*, in consideration of a creditor of her husband giving him further time to pay his debt, executed a deed jointly with her husband, in form a mortgage, of real estate, to secure its payment. This deed was not acknowledged according to the Acts of Assembly in relation to conveyances of land by *feme covert* grantors, nor did it purport to be in execution of a power reserved to her, but being for property, in fact held in trust for her separate use, which she had a right to convey as a *feme sole*, was considered in equity as creating a specific lien, and enforced accordingly. (a)

APPEAL from a decree of the Court of Chancery. The bill, which was filed on the 11th of December, 1821, stated that Dudley Poor, and Deborah, his wife, of the City of Baltimore, being indebted to the complainants, James Brundige, Thomas Vose, and William Worthington, in a large sum of money, for the purpose of securing the same, on the 12th day of June, 1819, conveyed to them, by way of mortgage, a lot of ground in the said city, with the buildings, &c. thereon, with a clause of redemption in case the money thereby intended to be secured should be paid on the 4th day of October, then

(a) Cited in *Berrett vs. Oliver*, 7 G. & J. 204; *Conn vs. Conn*, 1 Md. Ch. 216; *Müller vs. Williamson*, 5 Md. 284; *Cooke vs. Husbands*, 11 Md. 508; *Emerick vs. Cookley*, 35 Md. 190; *Hall vs. Eccleston*, 37 Md. 521; *Tyson vs. Latrobe*, 42 Md. 338. See *Tiernan vs. Poor*, 1 G. & J. m. p. 216, note.

next following. That Dudley Poor hath become insolvent, that a certain Matthew McLaughlin is his permanent trustee, and that no part of the mortgage debt hath been paid. Prayer, that the defend-

2 dants may be decreed to pay complainants' debt, with costs, or in * default thereof, that the mortgaged premises may be sold, and for general relief.

The answer of McLaughlin admitted that he had been appointed permanent trustee for the benefit of the creditors of Poor, and that he had paid no part of complainants' debt, principal or interest.

The answers of Poor and wife admit the execution of the mortgage as charged and exhibited with the bill; but "by way of plea and answer," they set forth the following facts as grounds of defence. "They say that the defendant, Deborah, as one of the heirs and devisees of John O'Donnell, deceased, was entitled to a large real and personal estate, which, by an order of the Chancery Court, was allotted to her, as will appear by referring to the proceedings on record, which they ask to have taken as a part of their answer. That after the said allotment, the defendants, by a deed duly executed, &c., and dated on the 4th of August, 1816, conveyed to a certain Columbus O'Donnell and John H. Poor, all their estate and interest in the share aforesaid, in trust, for the sole and separate use, benefit and behoof of the said Deborah, for life, so that she be suffered to take and receive the entire profits thereof to her own separate use, without being subject to the control of the said Dudley Poor, or of any future husband of the said Deborah, and in nowise answerable for the payment of his or their debts or engagements; and subject to be sold and conveyed by the said Deborah absolutely, in such manner as she may think proper, without the concurrence of her present or any future husband; and after the death of the said Deborah, then as to the whole of said property, or such parts thereof as may then be undisposed of by her deed or contract, in trust for her children as tenants in common; and in case she should die without children, for the use of such person or persons as she, by a writing in the nature of a will, may appoint, and in default of such appointment, to the right heirs of the said Deborah. And they further say, that the real estate mentioned in the mortgage is included in

3 the said * trust deed, and by way of plea, and in bar of the complainants' right to recover, they say they are advised they had no legal right to make said deed, and that no legal interest was thereby conveyed to the complainants, the legal title being outstanding in the said trustees, Columbus O'Donnell and John H. Poor; and moreover, that the said deed of mortgage is defectively executed, and even a legal or equitable title existed in these defendants, that the said deed exhibited by the complainants, with their bill, is wholly defective in its execution, and agreeably to the laws of Maryland conveys no legal or equitable title to the complainants," &c.

Lea
by m
defen
came
Th
exec
Th
with
Poor
said
then
gran
with
gag
T
plai
A
rest
T
the
mo
ert
ent
for

B
B
U
F

Leave was afterwards prayed for, and granted, to amend the bill, by making the said trustees, Columbus O'Donnell and John H. Poor, defendants, against whom, together with the other defendants, the same relief was prayed as by the original bill.

The answers of the defendants to the amended bill admitted the execution of the deed of trust, &c.

The original mortgage to the complainants was filed as an exhibit with the bill. The clause of redemption is, "that if the said Dudley Poor and Deborah Poor, his wife, their heirs, &c. shall pay to the said James Brundige, &c. the sum of \$2,059.75, on or before, &c., then this indenture shall cease," &c. It was acknowledged by the grantors on the day of its date, before two justices of the peace, without a privy examination of the wife being certified on the mortgage.

The general replication to the answers was entered by the complainants.

A commission issued by consent to take testimony, but the proof returned, does not appear to be material.

The complainants again, on the 14th of October, 1825, amended their bill, charging that the amount intended to be secured by the mortgage from Poor and wife to them, is a specific lien on the property therein mentioned, by reason of the said mortgage deed so executed as aforesaid, * and praying that the same may be sold 4 for the purpose of discharging the said lien.

The answer of Poor and wife to this amended bill admits the mortgage, but they state, by way of plea and answer thereto, all the grounds of defence set forth in their answer to the original bill; and they further say, that previous to the year 1819, the said Dudley Poor, as the security of a certain Moses Poor and Jonas Hastings, became indebted to the complainants as the agents of one John Tappan, in the amount mentioned in the mortgage, and that the same was executed by them in consideration of the said complainants' (on behalf of the said Tappan's) agreement to extend the time of payment of the money due them, as aforesaid, from the said Dudley. And they aver that the said debt was the debt of the said Dudley Poor, and that the said Deborah did not derive any benefit, or receive any consideration therefor. And they alleged in bar of the complainants' bill that they had no legal right to make said deed of mortgage, and if they had, that the same is defectively executed, &c.

On the 13th day of November, 1826, after the coming in of the preceding answer, the complainants again, with leave, amended their bill so as to make John Tappan a party complainant. In this bill Tappan is stated to be the actual creditor, and re-asserting the existence of a specific lien on the property contained in the mortgage for the aforesaid debt, they pray for a sale of it and for general relief. And at the same time the following agreement, signed by the solicitors of the parties, was filed: "The undersigned, solicitors

next following. That Dudley Poor hath become insolvent, that a certain Matthew McLaughlin is his permanent trustee, and that no part of the mortgage debt hath been paid. Prayer, that the defendants may be decreed to pay complainants' debt, with costs,

2 or in * default thereof, that the mortgaged premises may be sold, and for general relief.

The answer of McLaughlin admitted that he had been appointed permanent trustee for the benefit of the creditors of Poor, and that he had paid no part of complainants' debt, principal or interest.

The answers of Poor and wife admit the execution of the mortgage as charged and exhibited with the bill; but "by way of plea and answer," they set forth the following facts as grounds of defence. "They say that the defendant, Deborah, as one of the heirs and devisees of John O'Donnell, deceased, was entitled to a large real and personal estate, which, by an order of the Chancery Court, was allotted to her, as will appear by referring to the proceedings on record, which they ask to have taken as a part of their answer. That after the said allotment, the defendants, by a deed duly executed, &c., and dated on the 4th of August, 1816, conveyed to a certain Columbus O'Donnell and John H. Poor, all their estate and interest in the share aforesaid, in trust, for the sole and separate use, benefit and behoof of the said Deborah, for life, so that she be suffered to take and receive the entire profits thereof to her own separate use, without being subject to the control of the said Dudley Poor, or of any future husband of the said Deborah, and in nowise answerable for the payment of his or their debts or engagements; and subject to be sold and conveyed by the said Deborah absolutely, in such manner as she may think proper, without the concurrence of her present or any future husband; and after the death of the said Deborah, then as to the whole of said property, or such parts thereof as may then be undisposed of by her deed or contract, in trust for her children as tenants in common; and in case she should die without children, for the use of such person or persons as she, by a writing in the nature of a will, may appoint, and in default of such appointment, to the right heirs of the said Deborah. And they further say, that the real estate mentioned in the mortgage is included in

the said * trust deed, and by way of plea, and in bar of the
3 complainants' right to recover, they say they are advised they had no legal right to make said deed, and that no legal interest was thereby conveyed to the complainants, the legal title being outstanding in the said trustees, Columbus O'Donnell and John H. Poor; and moreover, that the said deed of mortgage is defectively executed, and even a legal or equitable title existed in these defendants, that the said deed exhibited by the complainants, with their bill, is wholly defective in its execution, and agreeably to the laws of Maryland conveys no legal or equitable title to the complainants," &c.

Leave was afterwards prayed for, and granted, to amend the bill, by making the said trustees, Columbus O'Donnell and John H. Poor, defendants, against whom, together with the other defendants, the same relief was prayed as by the original bill.

The answers of the defendants to the amended bill admitted the execution of the deed of trust, &c.

The original mortgage to the complainants was filed as an exhibit with the bill. The clause of redemption is, "that if the said Dudley Poor and Deborah Poor, his wife, their heirs, &c. shall pay to the said James Brundige, &c. the sum of \$2,059.75, on or before, &c., then this indenture shall cease," &c. It was acknowledged by the grantors on the day of its date, before two justices of the peace, without a privy examination of the wife being certified on the mortgage.

The general replication to the answers was entered by the complainants.

A commission issued by consent to take testimony, but the proof returned, does not appear to be material.

The complainants again, on the 14th of October, 1825, amended their bill, charging that the amount intended to be secured by the mortgage from Poor and wife to them, is a specific lien on the property therein mentioned, by reason of the said mortgage deed so executed as aforesaid, * and praying that the same may be sold 4 for the purpose of discharging the said lien.

The answer of Poor and wife to this amended bill admits the mortgage, but they state, by way of plea and answer thereto, all the grounds of defence set forth in their answer to the original bill; and they further say, that previous to the year 1819, the said Dudley Poor, as the security of a certain Moses Poor and Jonas Hastings, became indebted to the complainants as the agents of one John Tappan, in the amount mentioned in the mortgage, and that the same was executed by them in consideration of the said complainants' (on behalf of the said Tappan's) agreement to extend the time of payment of the money due them, as aforesaid, from the said Dudley Poor, and that the said Deborah did not derive any benefit, or receive any consideration therefor. And they alleged in bar of the complainants' bill that they had no legal right to make said deed of mortgage, and if they had, that the same is defectively executed, &c.

On the 13th day of November, 1826, after the coming in of the preceding answer, the complainants again, with leave, amended their bill so as to make John Tappan a party complainant. In this bill Tappan is stated to be the actual creditor, and re-asserting the existence of a specific lien on the property contained in the mortgage for the aforesaid debt, they pray for a sale of it and for general relief. And at the same time the following agreement, signed by the solicitors of the parties, was filed: "The undersigned, solicitors

for the parties in the above cause, do hereby agree that John Tappan shall be deemed and taken as a party complainant in the original and amended bills of complaint filed in this cause, in the same manner, to all intents and purposes, as if the said John Tappan had been inserted as a complainant in the same at the time the said bills were filed and exhibited in this Court. It is further agreed that the depositions, proofs and proceedings heretofore had, shall be read

5 in evidence in this cause in the same manner * as if the same had been taken after the filing of the answers in the said cause, and issue had been joined thereon. It is further agreed that the said complainants shall have leave to file their amended bill, making the said John Tappan party complainant, and that the answers heretofore filed shall be taken as answers to the said amended bill, and the depositions, proofs and proceedings heretofore had, shall be read in evidence in this cause in the same manner as if the same had been taken, filed and entered, after the filing of the said amended bill, and issue joined thereon."

BLAND, C. (September, 1826.) The original bill, filed on the 11th of December, 1821, alleges that Dudley Poor and his wife, on the 12th of June, 1819, mortgaged certain property to the plaintiffs, to secure to them the payment of the sum of \$2,057.57, on the 4th of October then next. And it also alleges, that Dudley Poor applied for and obtained the benefit of the insolvent laws, and that Matthew McLaughlin was appointed his trustee. On the 9th of December, 1823, the plaintiffs having obtained leave, amended their bill by which amended bill they allege that Dudley Poor and wife have conveyed the mortgaged property to Columbus O'Donnell and John H. Poor, in trust for the use and benefit of Dudley Poor's wife, of the nature of which they were ignorant; and therefore pray that those trustees may be made defendants, and that they may be ordered to produce the deed of trust.

These complainants, still not being entirely satisfied with their bill, obtained leave, and again amended it on the 14th of October, 1825. By this amendment they allege, that they are entitled to be paid out of the sale of the mortgaged property, on which they have a specific lien, by reason of the mortgage deed; and, in the opinion of the plaintiffs, their bill still requiring amendment, on the 13th of November, 1826, they obtained leave, and so amended it as to make John Tappan a plaintiff, who, as is alleged by this amendment, is, in truth, the real creditor, and that Brundige, Vose, * and

6 Worthington, in whose names the mortgage had been taken, were merely his agents.

The plaintiffs pray for a sale of the mortgaged property to pay the debt, and for general relief.

To the original bill, on the 13th of March, 1822, McLaughlin, the trustee, under the insolvent laws, of Dudley Poor, answered and

admitted all its allegations. On the 16th of December, 1822, Dudley Poor and wife, jointly pleaded in bar, that the mortgaged property had been previously conveyed to Columbus O'Donnell, and John H. Poor, in trust for the uses specified in the deed of trust, and therefore that the mortgage relied on by the plaintiffs, was insufficient and void. On the 3rd of August, 1824, O'Donnell and John H. Poor, by their joint answer, admit the execution of the deed of trust, and produce it as required by the first amended bill. After the amendments of the bill of the 9th of December, 1823, and of the 4th of October, 1825, Dudley Poor and wife again jointly pleaded, that they had, by a deed bearing date on the 4th of August, 1826, conveyed certain property therein described, including that in the proceedings mentioned to Columbus O'Donnell, and John H. Poor, in trust for the separate use of Dudley's wife, and for the uses mentioned in that deed; and then aver, and plead, that the mortgage deed for a part of the property which had been so conveyed in trust, is defectively executed, and that they had no legal right or power at that time to make such a contract, for that property. After which it was agreed that these answers, should stand as answers to the third amendment of the 13th of November, 1826. The general replication has been filed, issue joined, and the case standing ready for hearing, has been fully argued. The deed of trust of the 4th of August, 1816, was produced, commented upon, and its execution and verity on all hands entirely admitted. I have thus particularly stated the circumstances of this case, because the statement itself leads us directly to those well established principles upon which it may be at once disposed * of, without the least difficulty, and without being carried away into that group of decisions in relation to the execution of a power reserved to a *feme covert*, that have tasked the diligence, and exercised the ingenuity of so many distinguished lawyers; since there is no allegation in these pleadings, by which the Court can be called upon to treat the mortgage, upon which the plaintiffs sue, as an execution of the powers with which the wife of Dudley Poor has been clothed by the deed of trust. This case is simply this: the plaintiffs say, that to secure a debt due them, they obtained a mortgage of certain property from Dudley Poor and wife, which property they pray may be sold to pay that debt. To this Dudley Poor and wife plead in bar, that they had no legal right or power to make such a mortgage, for the reasons set forth. To this the plaintiffs have replied, generally, and issue has been joined, and the case set down for hearing. Where the defendant files a plea in bar, if the plaintiff conceives it to be defective in form and substance, and is anxious to have that matter determined, he may set the plea down for hearing, and take the judgment of the Court upon it. But if the plaintiff allows the plea to be correct, or it is so determined to be by the Court, he may then reply and join issue upon the truth of the facts therein set forth; and if, upon the hearing, the defendant

establishes the truth of the facts thus put in issue, the suit is at an end, so far as the plea extends. It is too late, after issue joined, to inquire into the formality of the plea, or whether it be in any respect defective in form: or whether any, and how far an answer might be necessary to its support, because the plaintiff, by replying to it, has thereby tacitly waived all objections of that sort, and admitted it to be a good bar in equity, if the facts be true. And it is the constant course of the Court where issue has been joined on the plea, and its truth is proved or admitted, to dismiss the bill with costs, if the plea goes to the whole. In this case, the plea of Dudley Poor and wife covers the whole and entire substance and merits of the plaintiff's

case; and * having been admitted by the replication to be good in point of equity, and the truth of the facts therein set forth having been established, there is an end of the plaintiff's case.

Decreed, that the complainants' bill of complaint be dismissed, with costs.

From which decree the complainants appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Moale, for the appellants, cited *Beames Eq. Plea*. 339, 240; *Harr. Ch. Pr.* 599; *Mitf.* 238; *Beames Eq. Plea*. 41; *Mitf.* 177, 239; *Chase vs. McDonald & Ridgely*, 7 H. & J. 176, 198; *Price vs. Bigham*, 1 b. 298; 3 *Johns. Ch.* 77; *Jacques vs. Trustees of the Methodist Church*, 17 *Johns.* 548; *Woods vs. Fulton*, 4 H. & J. 329; *Smith vs. Everett*, 4 *Bro. Ch. Rep.* 64; *Ex parte Wills*, 1 *Ves. Jr.* 162; *Legard & Hodges*, 1 b. 477.

Winchester, for the appellees, cited *Chalmers vs. Chambers*, 6 H. & J. 29; 1 *Madd. Ch.* 44, 45; *Colter vs. Laver*, 2 *P. Wms.* 623, 624; 1 *Scho. & Lef.* 62, 63; *Chase vs. McDonald*, 7 H. & J. 181.

Taney, Attorney-General, on the same side, cited *Mitf. Plea*. 241; *Chase vs. McDonald*, 7 H. & J. 198; *Chalmers vs. Chambers*, 6 H. & J. 29; *Coop. Eq. Plea.* 13, 14.

Williams, (District Attorney of the U. S.) in reply, cited *Chase vs. McDonald*, 7 H. & J. 170, 176, 178, 181, 197, 198; *Beames Eq. Pleas*, 333 to 349, 40, 42, 44, 48, 49; *Mitf.* 300, (*Ed.* 1827,) 299, 219, 294,

* 300; *Ham. Dig.* 427; *Coop. Plea*. 223, &c., 229, 231; *Ferguson vs. O'Hara*, 1 *Peters Cir. Court Rep.* 493; *Saltus vs. Tobias*, 7 *Johns. Ch.* 214; 3 *Johns. Ch.* 129, 144; *Price vs. Bigham*, 7 H. & J. 296; 3 *Johns. Ch.* 77; 7 H. & J. 296; 3 *Johns. Ch.* 77, 89; *Jacques vs. Methodist Church*, 17 *Johns.* 577; *Methodist Church vs. Jacques*, 1 *Johns. Ch.* 75; 1 *Madd. Ch.* 44, 45; *Hunt vs. Rousmanier*, 1 *Peters*, 13.

ARCHER, J. delivered the opinion of the Court. The decision in *Tiernan vs. Poor and Wife*, at the last term of this Court, has settled the principal questions upon which this cause must turn.

From the doctrines there maintained, Mrs. Poor possessed a right to encumber her property by deed, or contract, provided the same should be founded on a sufficient consideration.

It was further decided, that although the paper, purporting to be a mortgage, and which was the foundation of the suit, was not acknowledged according to the provisions of the Acts of Assembly, whatever might be the effects of such omission, in taking from the instrument the character, technically speaking, of a mortgage, yet that equity would treat * it as a mortgage, so far as to authorize a Court of Chancery to decree a sale of the property, **13** covered by it, for the payment of the debt it was executed to secure.

Taking the facts stated in the bill as true, there would be a sufficient consideration upon which to ground the complainant's bill; for that avers, that the defendant being indebted, executed the mortgage.

Admit the facts in the answer to be true, and a sufficient consideration is also manifested. There it is stated, that the mortgage was executed by Poor and wife, to secure to Tappan, one of the complainants, a debt which Poor owed him, and that it was made in consequence of Tappan's agreeing to extend the time of the payment of Poor's debt. Tappan's agreement to extend the payment, in consideration of the receipt of the mortgage, furnished a sufficient consideration to sustain the complainant's equity.

All the material allegations of the bill are admitted by the answer. In addition to a sufficient consideration as above stated, it is admitted that the instrument was executed. With these admissions, the instrument becomes, in the language of the bill, a specific lien on the property it covers.

There is, however, one fact averred in the bill, which is not admitted in the answer,—the joint indebtedness of the husband and wife; but that cannot be material, because the equity of the complainant is the same, whether the allegation that they were jointly indebted, be true or not. The real and only controversy is this: does there exist a specific lien on the property? and that the lien exists, whether they were jointly indebted, or whether Poor was indebted, and they jointly executed the instrument in consideration of forbearance.

It is not necessary to express any opinion as to the effect of replying to a plea, because we do not consider there is any plea filed in the cause. This paper filed by the defendant, which he indiscriminately calls a plea, and an answer, we consider as nothing more than an answer; and it is perfectly apparent from the proceedings in the cause, and from * the agreement of counsel, which constitutes a part of the cause, that it was so considered and treated by **14** them.

The decree of the Chancellor is reversed, and the cause remanded to the Court of Chancery, that a sale of the property may be there decreed, to satisfy the debt of the complainants. *Decree reversed.*

GIBBS *vs.* CLAGETT *et al.*—December, 1829.

The real estate of an intestate was adjudged incapable of division, and elected to be taken at the appraisement per acre, under the Act of Descents, by one of the heirs, who gave his bonds accordingly, conditioned to pay the co-heirs their several proportions of the appraised value of the land. Such heir, who was also the administrator, in consideration of retaining the amount of the intestate's debts to be paid by him, out of the proceeds of the real estate, delivered over the intestate's personal property to his co-heirs. It was afterwards discovered, that the land fell short of the estimated quantity, on which the appraisement was founded. In this case, a bill in equity, in which all the co-heirs were made defendants, was held to be a proper mode of obtaining relief, as well to rectify the error in the estimate of the land, as to obtain credit for the debts paid; which payments, if they exceed the proceeds of the land, may, as essential to full relief, be recovered back.

Upon the establishment of such a case, it is the duty of the Chancellor to direct the auditor to state an account between the parties; and the order to the auditor should invest him with the usual authority of taking testimony, upon the subject-matter of the account.

The objection that a bill is multifarious, should be raised by a demurrer, before answer; filing an answer, and going into an examination of testimony, as to the merits of the whole matter in controversy, is a waiver of that objection. (a)

If a bill be liable to be dismissed for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief. (b)

An agreement by the distributees of the personal estate, to refund to the administrator the amount paid by him, to the creditors of the deceased, beyond assets, is the subject of a special action on the case at law, not of a bill in equity. (c)

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainant, (now appellant.)

15 * The case is fully stated in the opinion delivered by this Court.

BLAND, C. (March Term, 1827.) The late Thomas Gibbs died in the year 1811, seized in fee of a parcel of land, which descended to these parties, or his children and heirs; to whom, by his testament, he gave the personal property of which he died possessed. And he left a widow, the mother of these parties. Some time after the death of the father, it was agreed among his widow and children,

(a) Approved in *Lockett vs. White*, 10 G. & J. 491; *Tartar vs. Gibbs*, 24 Md. 337; *Harryman vs. Harryman*, 49 Md. 68. But a Court of equity may, *sua sponte*, dismiss a bill for multifariousness, when deemed necessary to the proper administration of justice. *Tartar vs. Gibbs*, *supra*.

(b) Approved in *White vs. White*, 5 Gill, 376; *Dunn vs. Cooper*, 3 Md. Ch. 49.

(c) Cited in *Hamilton vs. Conine*, 28 Md. 641.

that the widow should reside on the land during her life or widowhood; and hold it, together with all the personal property of the deceased, during that time; that these defendants should also be permitted to reside on the land during their celibacy; and, that from the whole of the deceased's estate so held together, and from the cultivation of the land, the widow and the defendants should have a maintenance; and the residue of the rents and profits should be applied to the payment of the debts of the testator. The whole estate was held according to this agreement, until the latter part of the year 1815, when the widow died. In the fall of the year following, these parties made a distribution among themselves of the whole of the testator's personal property. The real estate which had descended to them, having been found incapable of division, without loss, this plaintiff, under the sanction of a judicial proceeding, instituted for the purpose of effecting a partition, elected to take the whole; and gave his bond, according to law, for the payment of the shares to which the other heirs were entitled; their sister Julia being then alive, but who has since died unmarried, intestate, and without issue. Elizabeth Clagett, one of these defendants, brought suit, and obtained judgment against this plaintiff, for the whole amount of her share. After which it appeared, on a re-survey, that the land descended and so taken by the plaintiff, was deficient in quantity.

* Upon this state of things this bill was filed. In the first place, the complainant alleges that the land was estimated to 16 contain a greater number of acres than it really did; that his bond, on which Elizabeth Clagett had obtained judgment, having been given on this erroneous estimate, he is entitled to an allowance for the deficiency; and therefore, he prays that she may be enjoined from suing out execution. This alleged deficiency being admitted by the answer, upon the motion to dissolve the injunction which had issued, a credit was directed to be given on the judgment, for that amount, and the injunction was dissolved as to the residue. This branch of the case is simple and clear. But then it is confined exclusively to the complainant, and this one defendant, Elizabeth Clagett, alone. It extends no farther; nor can it in any way affect either of the other defendants with any bearing of the injunction, which is the only equity upon which Elizabeth Clagett was brought in to answer it.

But it appears from the bill and exhibits, that there are other branches of this case, which are extended indiscriminately or jointly, to all the defendants. In the second place, the plaintiff alleges, that he managed the affairs of these defendants, and took care of their property; and he accordingly claimed a compensation for his stewardship. Thirdly, he alleges, that he paid the costs of the judicial proceedings for the partition of the land, and the expenses of surveying it. For these sums he claims reimbursement, as for so much money lent and advanced, to the use of the defendants. Fourthly,

he alleges, that it was agreed by these defendants, that he should be allowed out of the money which would be due from him, for the real estate he had elected to take, all sums which he should be entitled to out of his father's personal estate. And lastly, he alleges, that it was agreed he should be allowed, by way of set-off for all sums, with which he should be credited by the Orphans' Court, as administrator of his father, and for all claims against his father's estate, which he had paid, or should pay; that he has paid debts due from his late

17 father, to a much * greater amount than the assets which came to his hands; and therefore, now calls on these defendants to refund.

And for the purpose of obtaining a final decree, covering each of these several branches of his whole case, he prays specifically, that the defendants may account with him in the premises.

It was urged, that this was a proper case for an account; that it could not be correctly understood, and determined, without an account; and that this was the proper stage of the proceeding to ask for a decree to account. If I could be satisfied that this was a case in which the parties were entitled to ask for a decree, to account; or if I could look forward to any relief which I might give on having an account stated, I should not hesitate in sending the case to the auditor, either by a formal decree or a common order, to have an account stated. But I cannot see that the plaintiff would be likely to obtain any benefit from the labors of the auditor.

We are told that the common law action of account has become almost obsolete; because the parties, in all cases where that action would lie, find it more convenient to resort to a Court of equity. It is then evident, that in all cases where an action of account might have been brought, the Chancellor may pass a decree to account. By the common law, and the several English statutes, all of which are in force here, an action of account may be maintained by any one against his bailiff, or receiver, or any one who may be regarded as such; by one merchant against his partner, or another merchant; and by one joint tenant or tenant in common, against his companion; and also by and against the executor or administrator of such parties. But there is no instance of an action of account being brought by a bailiff, or receiver, against his principal; nor could such an action be sustained, from the very nature of things. Now it is clear, that the defendants, in reference to the whole or any branch of this case, cannot be considered, in any respect whatever, either as bailiffs, receivers, merchants, joint tenants, * or tenants in common.

18 No action of account could be maintained against them; and consequently they cannot be decreed to account.

But it may be said, that the analogous proceeding in a Court of Chancery, takes a different and a much more comprehensive scope than the common law action of account. It does so, but yet it also has its limits, and is tied down by rules. In a proper case of account

in equity, it would seem that both parties are regarded as actors, as reciprocally plaintiff and defendant; since it is certain, that if it should appear from the auditor's report, made in pursuance of a decree to account, that the plaintiff was indebted to the defendant, a final decree might be passed for such balance, in favor of the defendant against the plaintiff. But there could be no such judgment at law, in an action of account, against the plaintiff. In this case the plaintiff specifically prays, that all his claims may be set-off against the amount due by him to the defendants, for the land he had elected to take. But it is a settled principle of equity, that a party cannot be permitted to come here merely to obtain the benefit of a set-off. If his claims are susceptible of legal proof, and are such as may be set-off, his remedy is at law, and not in this Court. But in addition to those cases where an action of account would lie at common law, this Court can only decree an account where there are mutual demands, and a series of charges on the one side, and a variety of payments on the other; not merely a single payment or receipt; or where the defendant is chargeable as a trustee. And although in most cases where there are mutual demands, an action of assumpsit would lie, yet since the subject cannot be so well investigated in such an action a Court of Chancery will decree an account.

Upon these principles, where an insurance broker by his bill asked for discovery and an account of money paid and received by him on account of the defendant, and money due to him for commission, postage of letters, and upon notes endorsed to him, it was dismissed. And so too, * where a mechanic who had contracted to build a house, after he had performed the work, claimed a balance, **19** giving credit for several partial payments, and brought a bill for an account, it was dismissed. In both these cases it was held, that the remedy at law was complete, and therefore the complainants could not be allowed to bring their cases into a Court of Chancery.

Now in whatever way this case may be considered, either altogether or on any one branch, there are not accounts on each side. The defendants have, each of them, but one claim; and these claims of theirs are not held by them in common, but by each, in severalty. There is but one single transaction; no mutuality of dealings, no variety of accounts. Nor can these defendants be considered for any purpose whatever, as trustees.

On the other hand, there is indeed a sufficient complexity and diversity in the plaintiff's claims. The first of them is for an allowance for the deficiency in the quantity of the land he had elected to take; and it is admitted; but it is only a proportionate deduction which he is entitled to have from each defendant, individually, not conjointly. It is a claim by the plaintiff, in his own capacity as obligor, against each defendant as obligee. The second is for services rendered to all the defendants jointly, in the management of their joint concerns. If it be well founded in fact, it is a mere legal

claim, wholly distinct from the preceding, and of an entirely different nature. But it has not a single characteristic trait of equity about it. The third is merely for money paid and advanced; and, like the second, is properly the subject of an action of assumpsit. The fourth is one which seems to be founded on a particular agreement; and if so, it is also properly the subject of a special action upon the case at law, not of a bill in equity. The fifth and last claim, is in substance, that these defendants or distributees, be decreed to refund; and this plaintiff rests either on the agreement he sets out, or on the common justice of the Court. This is one of those demands which fall exclusively * within the cognizance of a Court of equity, and cannot be enforced at all, in any form of action at law. This claim to refund, when made by a creditor, or by one legatee against another, is always treated with respect, and never rejected without substantial reasons. But when presented by an executor or administrator, as in this instance, it must be alleged, and clearly appear, that the distribution was involuntarily made, or obtained by fraud or mistake, or without any agreement to refund.

Of these several claims of the plaintiff, the first presents but one single item between the parties on each side; the second, third and fourth, present cases like that of the insurance broker, where all the accounts are on the side of the plaintiff, and where there is ample relief at law, according to the plaintiff's own showing. The fifth is a case peculiarly proper for a Court of equity; but is not a case where the parties would be decreed to account, unless from some special circumstances. Although the Court might order an account to be stated, if the case should require to be elucidated by a calculation or statement. There is then nothing in this case to authorize or require a formal decree, or even a common order to account.

But the case stands for a final hearing on bill, answer, general replication, and proofs; and since an interlocutory decree to account cannot be passed, it must now be disposed of by a final decree.

The bill upon its face is multifarious. The five several claims of the plaintiff are not only separate and distinct in themselves, wholly unconnected with each other, but they are essentially different in their extent, nature, and character. The first is confined to the single question, what is the amount due from the plaintiff to each defendant. The second and third are merely legal claims against all the defendants, and are the subjects of actions upon the case at law. The fourth is founded on a special agreement, is wholly distinct from the rest; and the proper remedy, if any, is at law. And the fifth is a claim which could only * be sustained in this Court; is distinct in its nature, and of a character wholly different from all the others. The first claim, as against each defendant, it is true, originates from the same source, but the case of no one defendant is necessarily blended with the other. The four last claims have no

sort of connection with each other; but that of these same defendants being the joint party on the one side to them all.

The several component parts of the complainant's case are most unhappily incongruous, or incompatible with each other. One part consists of matter in which the defendants are not necessarily connected; three others belong exclusively to the Courts of common law, and the fifth presents a case in which the party can only be relieved in a Court of equity: these matters are apparent on the face of the bill. It is essential that there should be, to a certain extent, and at least apparently, a consistency and coherency in the several component parts of the plaintiff's case, as set out in his bill. And the entire case, the several parts of which have been so improperly blended as exhibited by the bill, (notwithstanding it may have been answered) should appear at the hearing to be of a character to confer jurisdiction on a Court of equity. Upon the whole, this bill cannot in any manner be sustained.

Decreed, that the complainant's bill of complaint be dismissed, with costs.

From this decree the complainant appealed to this Court.

The cause was argued before EARLE, MARTIN, and DORSEY, JJ.

Brewer, Jr. for the appellant, cited 6 *Bac. Ab.* 135; *Montague on Set-off*, 68, *App.* 5; *Cox vs. St. Bartholomew's Hospital*, 8 *Ves. Jr.* 140; *Maugham vs. Mason*, 1 *Ves. Jr.* 416; *Earle vs. Hinton*, 2 *Stra.* 732; *Ludlow vs. Simond*, 2 *Caine's Cas.* 38; *Tyson vs. Hollingsworth*, 1 *H. & J.* 470; *Connor vs. Drury*, 2 *H. & G.* 220; *Underhill vs. Van Cortlandt*, 2 *Johns. Ch.* 369; *Ludlow vs. Simond*, 2 *Caine's Cas.* 38, 40, 52; *Livingston vs. Livingston*, 4 *Johns. Ch.* 290; *Burgess vs. Wheate*, 1 *Eden*, 190; *Berke vs. Harris*, *Hard.* 337; *Ward vs. the Duke of Northumberland*, 2 *Anstr.* 469; 2 *Madd. Ch.* 234; *Mitf. Plead.* 147.

Shaw, for the appellees.

DORSEY, J. delivered the opinion of the Court. The bill states that Thomas Gibbs, late of Anne Arundel, died seized of a tract of land called Gibbs' Inheritance, which the complainant and his sisters, the defendants, inherited in co-parcenary. That it was appraised under the Act of Descents, in virtue of proceedings in Anne Arundel County Court, and being adjudged incapable of division, * the complainant elected to take the same at the appraisement, 24 and accordingly gave bond to the State of Maryland, in the penal sum of \$3,000; conditioned for the payment of \$612.75, to each of the other heirs for their proportion; the land being valued at \$15 per acre, and supposed to contain 204 acres, but that in fact, it contains but 190 acres, as appears by actual survey, since made. Exhibit A, is referred as a transcript of those proceedings, but it is nowhere to be found in the record before us. The bill further states, that Elizabeth Clagett, one of his sisters, hath brought suit on said bond in Anne Arundel County Court, recovered judgment thereon, and

levied a *fi. fa.* on the property of the complainant, which is now advertised for sale. That Thomas Gibbs died in 1811, having first made his last will and testament, sufficiently executed and attested to pass his personal, but not his real estate, by which he devised the whole of his real and personal estate to his wife for life, giving to his single daughters a home therein, and after the death of his wife, devising the land to your orator, and imposing on him, during his mother's life, the duty of superintending the whole property for her. That after the death of Thomas Gibbs, the widow and her single daughters, (Elizabeth Clagett being the only one who had married, but was then a widow,) continued to reside on, and cultivate said land, with the consent of said Elizabeth Clagett, and the complainant, until the father's will was discovered about three years after his death, when it was agreed between all his heirs, that the will should have the same effect it would have had if properly executed, except so far as related to the complainant, and that in pursuance of such agreement, the maiden sisters and mother continued to reside on and cultivate said land, until her death, which happened in the fall of 1815, the complainant superintending the farm during that period. That Thomas Gibbs died considerably in debt, and that letters of administration on his estate, were granted to the complainant, on the 9th of August, 1814, who returned an in-

25 ventory amounting to the sum of \$2,717.60; and on the 6th * of May, 1816, passed his first account, in which he was credited with \$313, the amount of his commission on the inventory and some debts paid. That on the 11th February, 1819, he passed another account, in which he was credited with debts due to himself and others, amounting to the sum of \$1,515.75½, and that on the 16th of October, 1824, he passed another account, and obtained credit for \$1,764.65, for claims due by his father's estate, and paid by the administrator, or authorized to be retained by him for his own claims, no part of which credits were paid out of the personal estate of the deceased, although amounting to \$876.30½ more than the whole amount thereof. The vouchers for all which claims, are stated to have been filed with the bill, as are also copies of said accounts settled with the Orphans' Court. The bill also states, that the complainant had paid other debts of the deceased, which he will make appear, and prays to be allowed for. And that the whole of the personal estate of Thomas Gibbs was in the fall of 1816, distributed between the complainants and defendants, by persons selected for that purpose, with which distribution, all parties at the time professed to be satisfied, and still retain possession of the proportions of property to them respectively allotted. That at the time such distribution was made, it was agreed between the complainant and his sisters, that he should elect to take the land, at the commissioners' valuation, and that he should be allowed out of the said valuation, all sums of money, with which he should be credited by the Orphans'

Court, as administrator of his father, and all sums which he should be entitled to out of his father's personal estate, and all claims against it, which he, as administrator, had paid or should pay. The defendants, by their answer, admit the proceedings in Anne Arundel County Court, as regards the land, the election of the complainant to take the same at the valuation, as stated in the bill. They admit also the deficiency in the quantity of the land, and that the complainant shall be entitled to a credit from each of these defendants for the sum of fifty-two dollars * and fifty cents, being the amount of their several proportions of said deficiency. The 26 defendant, Elizabeth Clagett, admits the judgment, execution and levying thereof on the property of the complainant. The defendants admit the will of Thomas Gibbs, and the time and circumstances attending the execution and discovery thereof, as stated in the bill, and the agreement of all the parties, that during the life-time of the mother, the property should be held in the manner directed by the will; but they allege that by that agreement, "for the purpose of saving the personal property from being sold, the crops made on the land, and the whole profits of the real and personal estate, should be applied to the payment of their father's debts." The defendants deny that the complainant, from the time of his father's death, continued to reside on the farm and to cultivate it, or superintend it for the use of their mother, until her death. But they charge that the complainant, during the time, and even prior to the death of their father, rented and cultivated for his own use, another farm at some distance off, and received the whole profits thereof, and that he could not have given the necessary attention to both places, and his only services were to sell the produce of the farm, and to apply the proceeds to the payment of their deceased father's debts. The defendants then "charge that, at the time of their father's death, there was on hand thirteen hogsheads of tobacco, part of the personal estate, which was sold by the complainant, who received the price thereof, but has not accounted for the same." They also state, that in the year of their father's death, there was made on the farm three hogsheads of tobacco, one other crop which was sold to John Claytor, and two other crops sold to Richard Estep; all of which were sold by the complainant, but are not accounted for. They also charge, that the rents and profits of the estate, received by the complainant, if fairly applied, were more than sufficient to pay their father's debts, and they deny that any allowance should be made for the superintendence of the farm. They also state, that the complainant had the * sole use, and received the wages of two sawyers, and one 27 plantation hand, for eight years; and that the complainant, so far from pretending, at the time of the division of the personal estate, that there was not a sufficiency to pay the debts of the deceased, then expressly stated, that the debts were all paid, except one of William Stewart's, of forty dollars, and that he had in his hands

at that time, a balance of \$600, arising from the sales of the tobacco, and that a crop of tobacco was hanging in the house. They further state, that at the time he took from the estate the two sawyers, as aforesaid, he said their wages would pay all the debts; and the defendants deny that any part of the moneys arising from the sales, ever was applied to the support of the family, or either of these defendants, but was received and expended by the complainant himself. They positively deny that there ever was, either at the time of the division of the personal estate, or any other time, any agreement or understanding, that the complainant should be allowed out of the valuation of the real estate, any sums of money whatever, for charges and credits which might be allowed him by the Orphans' Court, as stated in the bill of complaint.

An injunction having issued as prayed upon the filing of the bill, on hearing the motion to dissolve the same, after the answer came in, the Chancellor passed an order that the injunction be "dissolved, except as to the sum of \$52.50, for which sum the said Elizabeth Clagett is hereby required and enjoined to give the said Thomas Gibbs credit on her judgment."

Upon the return of the commissions with the testimony taken under them, the Chancellor, upon various grounds which are assigned in his decree, and which he alleges are apparent upon the face of the bill, refused to send the case to the auditor to state an account between the parties, and dismissed the complainant's bill.

To the correctness of this refusal and dismissal, we must be permitted to withhold our assent. We cannot discover * in the
28 bill of complaint that multifariousness, which, in the opinion of the Chancellor, precludes the complainant from all claim to relief. It was a ground of defence not relied on by the defendants; if it had been, they should not have answered, but have demurred to the bill. To test the accuracy of this objection, we must view the question as if it arose on such demurrer, and in so doing we at once divest it of the entire foundation on which, by the reasoning of the Chancellor, it is made to depend. The bill simply claims a deduction from the purchase money of the land for its deficiency in quantity, the cost of its survey, and the amount of the debts of the deceased settled by the administrator, and allowed by the Orphans' Court; and which, by the alleged specific agreement of the parties were to be so deducted. These credits all have reference to the same subject-matter; the land or price at which it sold; and in the same degree affect the interests of each and all of the defendants. So far then from viewing them, as the Chancellor appears to have done, as so complex, incongruous, and incompatible with each other, as to vitiate as multifarious, a bill which should unite them, we regard them as so connected and blended together, that had each subject been made the basis of a distinct bill, or had separate bills for the same matters been filed against each of the defendants, a Court of equity would, on motion,

have ordered them to be consolidated. To avoid the multiplication of suits and costs in Chancery, such a consolidation would be imperiously demanded.

But suppose it be conceded that the bill is multifarious, and therefore defective; the defendants have waived all exceptions to the defect, by filing their answer, and going into an examination of testimony, as to the merits of the whole matters in controversy. To permit them to take advantage of such an objection, at that stage of the proceedings, would be a fraud upon the complainant, and is not reconcilable to the order, liberality, and justice which pervades that system of rules by which Courts of Chancery are governed.

29
*If the bill, however, be liable to dismissal for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief, as the Chancellor appears to have designed it to be, in ordering a credit to be entered on Elizabeth Clagett's judgment, for one-fourth part of the amount of the deficiency in the quantity of land, which order the decree intended to leave in full force. Nor can we perceive the soundness of the discrimination made between the complainant's right to a credit against Elizabeth Clagett, and against the other defendants. His equity in both cases rested upon the same admission in the answer; and if it were proper, (as we think it was) to have allowed the credit on the judgment of Elizabeth Clagett, an endorsement of a similar credit should have been decreed to be entered upon the bond against the respective claims of Mary and Cassandra Gibbs.

The facts presented by the record before us, do not, we think, warrant our adoption of the Chancellor's views of most of the claims preferred by the complainant. The first claim, as numbered by him, being for a deficiency in the quantity of land, is admitted to be a fit subject of equitable jurisdiction: but he insists that the claim against each defendant, is separate and distinct, and should be the subject of an independent bill. To this doctrine, the object and effect of which would be an useless multiplication of actions, we cannot subscribe. The deduction sought for being from the whole valuation of the real estate, and not from the proportion of any particular distributee: all who are interested therein, not only may, but ought to be made, parties to the bill.

The second claim, says the Chancellor, is for services rendered all the defendants jointly, in the management of their concerns, and is purely legal, not having one characteristic trait of equity about it. There is nothing in the record in this cause, from which we could infer that the complainant ever urged any such claim as that thus enumerated, as a discount from his bond. The bill certainly
30
*prays for no such relief, nor ought the proof taken on the subject to be regarded, as indicating a design to urge such a claim. The taking of such testimony, appears to have been wholly defensive, and to have been the necessary consequence of the defence set up

by the answer, which charged the payment of the debts of the deceased to have been made (by agreement of all the parties concerned) out of the rents and profits of the real estate, and not out of the individual funds of the complainant. To a correct ascertainment of which rents and profits, applicable to that object, proof of the expenses, incident to the cultivation of the land, was indispensable.

For the recovery of the third claim, as it is denominated in the decree, being for the costs of a survey, the facts in the record disclose no remedy to the complainant, either at law, or in equity.

The fourth claim says the decree is founded on a particular agreement, and is the subject of a special action on the case at law, not of a bill in equity. If this had been simply an agreement by the distributees of the personal estate, to refund to the administrator the amount paid by him to the creditors of the deceased, the force of the Chancellor's position could not be evaded. But that is not the case before us. Here there was a special agreement, founded on an adequate consideration, that the amounts of all debts of the deceased, paid by the complainant, should be retained by him out of the amount of the valuation of the real estate, of which he should elect to become the purchaser. Upon the faith, and in pursuance of this agreement, the personal estate is delivered over to the defendants. The complainant elects to take the land at its valuation, and pays the debts of the deceased. Ought a Court of equity, under such circumstances, to stand by and permit the defendants to commit so gross a fraud upon the complainant, as to wrest from his hands the whole of that fund, which they had specifically pledged for the payment of his claims? We think not. The agreement of the parties,

31 as *stated in the bill, and sustained by the testimony, shews that the complainant never consented to rely on the personal responsibility of the defendants, and should not therefore be compelled to resort to it, but that he looked for indemnity and reimbursement to the purchase money of the land, on which he had a clear, equitable lien. Upon payment of debts of the deceased by the administrator, out of his own funds, equal to the whole amount due on the bonds, a Court of equity should decree its cancellation. Upon payment to a less amount, it should decree that a credit for the same be endorsed upon the bond.

As regards the prayer of the complainant, that in case his claim should overrun the amount due on his bond, the defendants should be decreed to repay him the difference, we consider it reasonable, and that to grant it, is within scope of clear Chancery powers. Having once acquired jurisdiction over the subject-matter, by ascertaining the amount due to the complainant, with a view to its deduction from the valuation of the land; the authority to grant full relief, follows as a necessary consequence.

We have gone thus at large in disclosing our views of the grounds on which the Chancellor bottomed his decree, in order to facilitate

future proceedings in this cause, which must take place before him. And confining ourselves within those limits, which he professedly prescribed to himself, our remarks have been predicated upon the bill alone, without reference to the answer of the defendants, or the testimony taken under the commissions issued for that purpose. It becomes us now to make a single observation upon the merits of the case, as presented by the record.

The agreement charged in the answer is unsupported by proof, whereas that alleged in the bill of complaint is substantiated by two witnesses, who made the distribution of the personal property, and their testimony is corroborated by pregnant circumstances. We therefore think there is error, not only in the general dismissal of the bill under * the circumstances in which it was made, but that the Chancellor erred in refusing to direct the auditor to **32** state an account, elucidating the matters in controversy between the parties, and thereby presenting the items of litigation more distinctly to the view of the Court. The facts in this case render it indispensably necessary, that the order to the auditor should invest him with the usual authority of taking testimony upon the subjects matter of account, which are embraced in his statements.

Decree reversed.

SIMMONS *vs.* DRURY.—December, 1829.

D. by last will, devised as follows: "Item. I give and bequeath to my two grandsons, S. and W. sixty dollars each; and all the rest and residue of my personal estate, I give to be equally divided among my five sons." He also devised his real estate to his widow, and after her death, or marriage, directed his executors to sell it, and divide the proceeds among his sons. The testator's personal estate being insufficient to pay his debts, and also the pecuniary legacies, one of the grandsons, after the widow's death, filed a bill to have the land sold for the payment of his legacy. *Held*, That he was not entitled to relief. (a)

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainant (now appellant.) The bill which was filed on the 4th of February, 1825, stated, that Charles Drury, the grandfather of the complainant, by his last and testament, dated on the 8th of July, 1806, bequeathed to him the sum of \$60, after his debts and funeral charges should be paid. The testator then directed, that his land after the death or marriage of his wife, (to whom he gave an estate in the same during widowhood,) should be sold by his executors, Henry Childs Drury and Charles Drury, and the money, therefrom arising, to be divided between his five sons, of

(a) Cited in *Cornish vs. Willson*, 6 Gill, 816. Cf. *Stevens vs. Gregg*, 10 G. & J. 148.

33 whom the said executors * are two. That one of the testator's sons has since died, as has also his widow. That the personal estate, except a very small balance, has been exhausted in the payments of debts, so that complainant has only received \$10, on account of his legacy, that being his proportion of the residuum in the hands of the executors. That Henry C. Drury, one of the executors and heirs of the said testator, has purchased the title of the other heirs to the land, and refuses to sell the same for the satisfaction of the balance of complainant's legacy. Prayer, that a decree may be had for the sale of said land, for the purpose of paying said legacy, and for general relief.

Charles Drury's will, referred to in the bill, contains, among others, the following clauses: "Item. I give and bequeath to my two grandsons, William T. Simmons and Aaron Welch, sixty dollars each." "And all the rest and residue of my personal estate, I give to be equally divided between my said five sons."

The answer of Henry C. Drury, Charles Drury, and Samuel Drury, three of the defendants, admitted the will of Charles Drury, the testator, and that he made such a disposition of his land, and bequeathed the legacy to the complainant as his bill charges. The defendants, Charles and Samuel, admit they sold their interest in the land to the defendant, Henry C., who alleges that he purchased the interest of the defendant, Joseph Drury. The defendant, Henry C., states, that he paid the complainant his full proportion of the personal assets of the testator, on account of his legacy, as will appear by his receipt, filed with his answer. The defendants then deny, that the land devised to them by their father, is liable for the balance of complainant's legacy, as it is not, by the testator, made a charge thereon.

The answer of Joseph Drury, admits the facts set forth in the bill, and consents to the decree as prayed.

34 * The complainant's receipt on account of his legacy, referred to in the answer of Henry C. Drury, was admitted to have been signed by the complainant.

A commission issued, to take testimony, but the proof taken does not appear to be material.

BLAND, C. (July Term, 1827.) This case standing ready for hearing, the solicitors of the parties were fully heard, and the proceedings read and considered.

It was urged, that the Stat. of 5 Geo. 2, chap. 7, by which, lands in this State were subjected to the payment of debts, must be allowed to have a direct and strong influence upon cases of this description. But whatever may be its effect under certain circumstances, I do not think that it can have any material bearing upon this particular case, and therefore, shall express no opinion respecting it, in any way whatever.

All the cases that have been cited as analogous to this, show, that the Court has been altogether, or mainly governed, by what was deemed to be the intention of the testator. The whole controversy, here turns upon the single point of the intention of this testator, Charles Drury. He sets out with the general declaration, "after my debts and funeral charges are paid," but he does not say how, when, or out of what fund, they are to be paid; nor does he make any allusion to them. Hence this expression can be considered in no other light, than as a general recognition of the legal liability of the whole of his estate, to the payment of his debts and funeral charges. It manifests no intention to alter or change the general bearing of that liability in any manner whatever.

It is a very ancient and well established principle of our law, that the personal estate of a deceased debtor, shall be considered as the natural fund, for the payment of his debts, and must be first applied for that purpose. There are many cases, however, in which a Court of equity will so marshal * the assets in favor of creditors and legatees, as to relieve the personal estate from the grasp of **35** those who have other means of obtaining satisfaction. But those cases only shew and illustrate the nature of the power of the Court, under these circumstances, where the law, or the intention of the testator allows of the exercise of such a power. Here the intention of the testator, Charles Drury, is clear and decisive against the application of any such authority.

It is evident that he had under his contemplation the whole of his estate, made up as it was of the two well known kinds of property, real and personal, the legal character of each component part of which he perfectly understood, or shewed no disposition to alter in any one particular, in reference to the objects of his bounty. He first distinctly and specifically disposes of his whole real estate to his wife, for life, or during her widowhood, and after to his sons. He then proceeds to his personalty. He gives several pecuniary legacies, and then, by a sweeping bequest, disposes of "all the rest and residue of his personal estate." Taking the whole will together, it amounts to this. That after the estate has been cleared of all claims against it, in the usual manner, and according to law, the realty shall go to his wife and sons, and the personalty, if sufficient, shall be applied to the payment of certain legacies, and the residue, if any, to his sons. The devise of the land is as much and properly a specific donation, as the bequest of the pecuniary legacies. To charge the pecuniary legacies upon the land directly or indirectly, or by substitution, or otherwise, it is conceived would be a manifest violation of the intention of the testator, and unwarranted by any law, or adjudged case.

Decreed, that the complainant's bill be dismissed, with costs.

From which decree the complainant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

36 * *Boyle*, for the appellant, said, the question is whether as the personal estate is insufficient to pay debts and legacies, and the debts having been paid out of the personal estate, the real estate should not be sold to pay the balance of the legacy to the complainant. He cited *Bac. Ab. tit. Ex'or*, (L. 2;) *Ford vs. Grey*, 1 *Cas. in Chan.* 297; 2 *Chan. Rep.* 155; *Kaimes Pr. Eq. B. 1, sec. 1, 16*; 2 *Cas. in Chan.* 4; *Ib.* 115; *Ib.* 117; *Chepping vs. Chepping*, 1 *P. Wms.* 739; *Curton vs. Pierpont*, 2 *P. Wms.* 81; *Wainwright vs. Waterman*, 1 *Ves.* 312; The Acts of 1785, ch. 80, and 1798, ch. 101, sub-ch. 8, sec. 17; *Tyson vs. Hollingsworth*, 1 *H. & J.* 460; Stat. 5 Geo. 2, ch. 7, sec. 4; *Kilty's Rep. of the Statutes*, 249.

Brewer, Jr. for the appellees, referred to 4 *Bac. Ab.* 282, 286.

Decree affirmed.

ALDRIDGE AND HIGDON vs. WEEMS AND HALL.—December, 1829.

T. who was indebted to A. and H. held a mortgage from W. upon which he made the following assignment, under his hand and seal. "For value received, I hereby transfer, assign and make over to Messrs. A. and H. this mortgage and the debt so intended to be secured thereby, witness my hand and seal, this, &c." About twelve months after, T. died. The mortgage and assignment were found uncanceled among his papers. To a bill filed by A. and H. against the mortgagor and T's administrator, to enforce the assignment for the payment of their debt, which alleged, that T. had promised to secure their debt by making the assignment in question, the answer of the administrator stated, "that T. might have promised to secure the debt, and that the endorsement may have been written on the mortgage with a view to comply with such promise, but denied that there was a delivery of it in fact by T. or an acceptance thereof by the complainants." Upon appeal, it was *held*, that an assignment of T's interest in the mortgage, might be good and operative, without actual delivery, if * connected with evidence to show he intended it to transfer his interest, in the thing assigned. That this assignment had all the forms and solemnities necessary to constitute a good contract, was in his hand-writing, signed by him, and contained a full expression of his intention to transfer his interest in the mortgage. (a)

37 A Court of equity has the power, and will make every possible effort, within the range allowed by the Statute of Frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law.

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainants, (now appellants.) The bill filed on the 5th of September, 1826, stated, that the complainants for a number of years were engaged as copartners in trade, in the City of Baltimore; that while so engaged in business, Thomas Tongue and Thomas T.

(a) Approved in *Carson vs. Phelps*, 40 Md. 99. See *Alexander vs. Ghieslin*, 5 Gill, 189.

McPherson, of Anne Arundel County, also engaged in trade under the firm name of Tongue and McPherson, became indebted to them in the sum of \$5,009.95, with interest; that much of this claim had existed for several years, and Tongue, who in the dealings between the two firms, was principally known and relied on by the complainants, had repeatedly promised to secure the payment of the said claim with interest. That Williams Weems (one of the defendants and appellees) being indebted to Tongue, in the sum of \$2,900, in order to secure the payment thereof, did, on the 14th of December, 1821, execute to the said Tongue a deed of mortgage, thereby conveying to him and his heirs, a tract or parcel of land called Portland Manor, lying in Anne Arundel County, and containing 300 acres, with a proviso, that if Weems, his heirs, &c. should pay to Tongue, his executors, &c. the said sum of \$2,900, with interest thereon, in four years from the date thereof, then the said deed to be void. That the said deed was in due form of law acknowledged and recorded; that the said debt remains due, and the time limited for payment thereof expired in the month of December, 1825; and the debt intended to be secured by the said deed, being unsatisfied, a decree for the sale of the premises may now be asked. That after the execution of the said deed, and before the * expiration of the time allowed to Weems for the payment of the said debt, Tongue, 38 proposed to the complainants to take, and they at his request agreed to take an assignment of the said mortgage, as a security to them, for the payment of so much of the debt due from Tongue and McPherson, to the complainants, as by the said deed, Weems acknowledged that he owed to Tongue. The proposition of Tongue being acceded to by the complainants, and the form of the assignment which they were willing to take, being furnished to Tongue by the complainants, Tongue, in pursuance of the agreement aforesaid, on the back of the said deed of mortgage, wrote the following assignment: "For value received, I hereby transfer, assign and make over to Messrs. Aldridge and Higdon of Baltimore, this mortgage, and the debt so intended to be secured thereby. Witness my hand and seal, this 11th day of January, 1825." And the said assignment, in the hand-writing of Tongue, was by him, on the day expressed therein, signed, sealed and delivered to the complainants. The same however was an insufficient security for the debt of the complainants, and the time allowed in the deed to Weems to pay his debt, not having expired, the complainants, at the request of Tongue agreed to leave the same in his possession, and the same was kept by him, the complainants having no occasion for it, until the death of Tongue, which happened a very short time afterwards. That the assignment was intended to operate, not as an absolute transfer to the complainants of the debt due from Weems to Tongue, but only as a security in part for the payment of a larger debt, due to them from Tongue, though they are willing to accept of the same, when

the precise sum due on the mortgage is ascertained, as a transfer of the debt, and a payment of so much of their claim. But the complainants are advised and expressly charge, that the effect of such assignment is, to give them a right to demand the said debt of Weems, to take legal steps for the recovery of it, and in a Court of equity, they are the persons to ask, that in default of payment, a decree be * passed for a sale of the mortgaged premises.

39 They also charge, that the debt due to them from Tongue and McPherson is unpaid, and they have received no other security for the payment of it. That Weems has had notice of the said assignment; and although repeatedly requested, has refused to pay the debt due from him as aforesaid, or any part, but the same is still due. They further charge, that shortly after the execution of the assignment, Tongue died intestate; that letters of administration upon his estate have been granted to Thomas J. Hall, (the other defendant and appellee,) who having possessed himself of the effects and papers of his intestate, now holds the said mortgage and assignment; and the complainants pray, that he may be compelled to bring the same into Court, in order that the right of the complainants thereto, may be shown, and a decree for the sale of the premises may be had. Prayer, that a decree may be had for the sale of the mortgaged premises for the benefit of the complainants, unless Weems shall, within a time therein to be limited, pay to them the debt due by him; and also for general relief.

The answer of Hall, admitted the partnership of the complainants, and that of Tongue and McPherson; also, that Weems was indebted to Tongue, and executed the mortgage mentioned, which he exhibited; also, that the endorsement on the mortgage, was in the hand-writing of Tongue; but he denied that the mortgage was ever delivered, either actually or virtually to the complainants by Tongue; and he stated, that the mortgage was found among Tongue's papers, after his death, not connected with any other paper or memorandum, to show that it had been left with him by the complainants. He admitted that Tongue might have promised to secure the debt due by Tongue and McPherson to the complainants, and that the endorsement may have been written on the mortgage by Tongue, with a view of complying with such promise; but he denied that there ever was a delivery in fact of the mortgage, by Tongue, or an acceptance thereof by the complainants. That Tongue * died

40 in January, 1826, nearly a year after the date of the endorsement on the mortgage. That soon after the death of Tongue, and granting letters of administration to this defendant, he addressed a letter to the complainants, upon the subject of Tongue's affairs, in the expectation of receiving some important information from them. in their answer, there was no allusion to the assignment of the mortgage, and no claim or pretence set up to any part of Tongue's property, or to any of his securities, as having been appropriated to the

benefit of, or assigned to the complainants. They did not then pretend to claim the mortgage upon Weems, as having been assigned to them. He believed, that the first information which they received of the endorsement on the mortgage, was communicated by him, no demand having been made by them for the surrender or delivery thereof, until after they had been informed by this defendant, of the existence of such endorsement. He knows nothing of, and therefore does not admit the statement in the bill of the form of an assignment, having been furnished by the complainants to Tongue. That the personal estate of Tongue, will not be sufficient to discharge his debts, and that he is advised not to surrender the said mortgage, unless he is compelled by law so to do, &c.

The answer of Weems admitted the execution of the mortgage, and the justice of the claim for which it was given. He knew nothing of the other facts stated in the bill. He claimed to be credited with the sum of \$439.26, being for tobacco delivered to Tongue, in part payment of the mortgage.

Admissions.—It was admitted by the parties, that the letter from the defendant Hall to the complainants, and that from the complainants to Hall, marked exhibits A and B, were written by the parties signing them, and are the letters spoken of in the answer of Hall. Also, at the time of Tongue's death, and at the date of the endorsement on the mortgage, the partnership of Tongue and McPherson * were largely indebted to the complainants, and that Tongue, the mortgagee, was one of that firm. Also, that the 41 endorsement on the said mortgage, and the signature thereto, are in the hand-writing of Tongue.

Exhibit A.—Letter from Hall to the complainants, dated T. Land-ing, the 10th of February, 1826. "Knowing the intimacy which existed between the late Thomas Tongue and yourselves, and the mutual friendship between you, I have taken the liberty of calling on you, for any information you may be in possession of, relative to his business with the Messrs. Mullikins; also any information you possess, relative to the amount of debts due from him individually in Baltimore. There are rumors here, that are really alarming to those interested in his estate, respecting money due in Baltimore. Be good enough to give me your ideas generally, as regards the Mullikins, and what would be the most judicious course to pursue in recovering the money, also the amount they owe him, for it is impossible to ascertain it from his papers. This is a confidential communication, and your reply shall be so considered."

Exhibit B.—Letter from the complainants to Hall, dated Baltimore, the 11th of February, 1826. "In reply to your letter of the 10th inst. we would merely remark, that we are confident that the claims in this place against T. Tongue, individually, cannot be large; but as we are not at present enabled to state, with any degree of certainty, the amount due by him, we would recommend your taking

a trip to this place, when you can, on the spot, get more satisfactory information. We think it also necessary, that you should see Mr. R. Mullikin, he resides here, relative to the claim against B. D. and R. Mullikin; and we shall take great pleasure in giving you all the information, as well as advice, relative thereto. We can now say, that we saw notes in possession of Mr. Tongue, for \$3,500, each drawn by B. D. and R. Mullikin; but which Mr. T. said was about \$3,000 short of what they owed him. You must come up."

42 * BLAND, C. (December Term, 1826.) The only question in this case is, whether the writing of the 11th of January, 1825, endorsed on the mortgage, is available to the plaintiffs or not? There can be no doubt, that delivery is essential to the validity of a deed; nor can it be doubted, that this Court has the power, and will make every possible effort, within the range allowed by the Statute of Frauds, to heal the infirmities of defective contracts of every description, that can be sanctioned by the law. But the objection to the plaintiffs taking any thing by this writing is, not that it wants any of the forms and solemnities peculiar to any class of contracts, or that it is an imperfect expression of the will and agreement of the party. It is, that it has not, nor never had, as a contract, that which is of the vital essence of all obligations, the free and final assent of the party; and, consequently, that it is not a contract at all, or in any sense.

The assent of the parties is indispensably necessary to the formation of all contracts. The various forms and ceremonies prescribed, or required by the law, are the solemn precautions, the evidences, by which the free and deliberate assent of the mind of the person contracting, are required to be externally manifested; and, when the consent of the party is clearly established, equity will go far in supplying the want of them.

The doctrine, in relation to equitable mortgages, has no direct bearing upon this question. But, most of the cases that have been referred to in the argument, are those which involve the question of an equitable mortgage or not; and, indeed all others, which arise out of informal, defective, mistaken, or part executed contracts, turn upon the establishment of this preliminary point, the final and deliberate assent of the party, who is alleged to have contracted. For, a complainant cannot ask a remedy for any omitted form or solemnity; nor can the Court be called on to supply a defective expression of will; to correct an error; or to complete the execution of an un-

43 finished intention, where there is no * satisfactory proof of any deliberate and final intention to contract, ever having existed.

That the late Thomas Tongue contemplated an assignment of the mortgage; that he meditated upon it; and that he expressed his thoughts upon the subject in writing, there can be no doubt. But,

there is not the least evidence, that he had ever, at any time during his life, given his final consent to such a contract as that, upon which it appears, he had seriously reflected, and thus expressed his thoughts. He contemplated making an acknowledgment, that he had received value for the mortgage; and, he expressed the result of his meditation upon the subject of making an assignment of it, to the plaintiffs, in consideration thereof; but there is no proof that he ever did so, in fact. He never informed the plaintiffs, or any one else, that he had done so; nor were they ever in any way apprised, that he had made and assented to a contract, by which he assigned the mortgage to them. This writing remained in Tongue's own possession, under his own entire and absolute control, until his death; and, being so left, without that assent, essentially necessary to the creation of an obligation, it cannot now be considered as a contract or agreement, of any description whatever. Nor, can it be allowed to take effect, in any way, as a testamentary writing; because there is nothing upon the face of it; nor any act, or evidence in relation to it, which shows, that it was made in contemplation of the death of the writer; or, was ever intended by him, to take effect after his decease. This writing is, therefore, in every point of view, a mere nullity. Decreed, that the bill of complaint of the complainants, be dismissed with costs.

From which decree the complainants appealed to this Court.

The cause was argued before EARLE, MARTIN, and DORSEY, JJ.

* *Magruder*, for the appellants, contended, 1. That they were entitled to the same relief against Hall, the administra- 44 tor of Tongue, that they could have had against Tongue, had he been alive. *Dorsey vs. Smithson*, 6 H. & J. 61. 2. That the assignment of the mortgage being proved to be in the hand-writing of the mortgagee, entitled the appellants, as assignees, to the debt thereby secured, and to the security for the payment of it; of course the relief prayed ought to have been granted. He cited 2 *Com. Dig.* 373, cites 2 *Ch. Cas.* 7, 37; *Clavering vs. Clavering*, 2 *Vern.* 473; *Boughton vs. Boughton*, 1 *Atk.* 625; *Johnson vs. Smith*, 1 *Ves.* 314; *Souverby vs. Arden*, 1 *Johns. Ch.* 240, 256; 1 *Madd. Ch.* 299; *Pow. on Mort.* 460; *Ham. Dig.* 365, pl. 21; *Ex parte Bruce*, 1 *Rose*, 374; *Hankey vs. Vernon*, 2 *Cox's Ch.* 13; *Burn vs. Burn*, 3 *Ves.* 573, 582, 583; *Mestaer vs. Gillespie*, 11 *Ves.* 624; *Saunderson vs. Jackson*, 2 *Boss. and Pull.* 239.

S. Pinkney, for the appellees. The delivery of an instrument of writing is essential. *Clarke vs. Ray*, 1 H. & J. 323; *McCulloh vs. Dashiell*, 1 H. & G. 96; *Goodrich vs. Walker*, 1 *Johns. Cas.* 250; *Clavering vs. Clavering*, 2 *Vern.* 473; *Souverby vs. Arden*, 1 *Johns. Ch.* 240.

Shaw, also for the appellees, cited 2 *Jacobs' L. D.* 223; *Mandeville vs. Welsh*, 5 *Wheat.* 284; *Ex parte Mountfort*, 14 *Ves.* 606; *Ex parte Coombe*, 17 *Ves.* 369; *Ex parte Bulteel*, 2 *Cox's Ch. Cas.* 247.

46 *Magruder*, in reply. *The creditors are not before the Court. The cases cited on the other side, were cases of bankruptcy, where the creditors were seeking to recover. If there was a consideration given for the assignment, Chancery can enforce it. *Black vs. Cord*, 2 H. & G. 109; *Lord Carteret vs. Paschal*, 3 P. Wms. 199; *Bunn vs. Winthrop*, 1 Johns. Ch. Rep. 336. Tongue held the assignment in trust for the benefit of the complainants. *Moses vs. Murgatroyd*, 1 Johns. Ch. 119; *Cumberland vs. Codrington*, 3 Johns. Ch. 261; *Shepherd vs. McEvers*, 4 Johns. Ch. 136.

MARTIN, J. delivered the opinion of the Court. The bill charges that Tongue and McPherson were indebted to Aldridge and Higdon in a large sum of money, and that Tongue, who was the active partner, had repeatedly promised to secure the payment of the same. That Weems was indebted to Tongue, and gave him a deed of mortgage on the 14th day of December, 1821, to secure the payment of the debt in four years after the date of the mortgage. That before the expiration of the time allowed Weems for payment, Tongue proposed, and the complainants agreed, to accept an assignment of this mortgage, as security to them in part payment of their debt, and accordingly the following assignment was made by Tongue on the mortgage: "For value received, I hereby transfer, assign and make over to Messrs. Aldridge and Higdon, of Baltimore, this mortgage, and the debt so intended to be secured thereby: witness my hand and seal, this eleventh day of January, eighteen hundred and twenty-five." That Tongue, *in a short time after this assign-

47 ment, died intestate, and letters of administration, were granted to Hall, &c. The answer of Hall admits the partnership of Tongue and McPherson; that the mortgage, as set out in the bill, was executed by Weems, and that the endorsement on the mortgage purporting to be an assignment, is in the hand-writing of Tongue. That the mortgage was found among Tongue's papers at his death. He further admits that Tongue might have promised to secure the debt due to the complainants, and that the endorsement may have been written on said mortgage, with a view of complying with such promise, but he denies that there ever was a delivery in fact of the said mortgage by Tongue, or an acceptance thereof by the said complainants. It is also stated in the answer, that Tongue died in January, 1826. The only question put in issue by this bill and answer, is, whether it was necessary to give legal effect to this assignment, that there should be a delivery of the mortgage by Tongue to the complainants.

In examining this case, it is necessary to keep constantly in view, that this is not a mortgage or deed that requires delivery to give it legal effect, but an assignment of Tongue's interest in the mortgage, that may be good and operative without actual delivery, if there is evidence to shew the party intended it, to transfer his interest in

the thing assigned. This doctrine is admitted by the Chancellor in his decree, and that a Court of equity has the power, and will make every possible effort, within the range allowed by the Statute of Frauds, to heal the infirmities of defective contracts of every description, that can be sanctioned by the law. This assignment has all the forms and solemnities necessary to constitute a good contract. It is in the hand-writing of Tongue, and signed by him, and is a full expression of his intention to transfer his interest in the mortgage, to Aldridge and Higdon. This not only appears on the face of the assignment itself, but is admitted by the answer of Hall, the administrator of Tongue.

* In his answer, responsive to the bill, he admits the assignment is in the hand-writing of Tongue, and was found among 48 his papers at his death. That the said Tongue might have promised to secure the debt due to Aldridge and Higdon, and that the endorsement may have been written on the said mortgage by the said Tongue, with a view of complying with such promise.

It was the moral duty of Tongue to secure the debt due to Aldridge and Higdon. It was his express agreement to do so. He has made a solemn instrument in his own hand-writing, and signed by him to produce that effect, and this instrument remains in his possession, uncanceled, until the day of his death; yet it is said you are to presume this was all idle and nugatory, and that too, in a Court of equity, whose peculiar province and pleasure it is to heal defective contracts, and carry the intention of parties into effect. This doctrine would pervert the equitable powers of a Court of Chancery.

The object and intention of Tongue, when he made the assignment, is not only obvious from the writing itself, but is admitted by the administrator, and his permitting it to remain uncanceled, affords a strong presumption that the same intention continued to the day of his death. This record presents no sufficient evidence to rebut that presumption. We are therefore of opinion that the decree of the Chancellor is erroneous, and ought to be reversed.

Decree reversed.

* JOHN S. STILES *vs.* JAMES H. CAUSTEN.—December, 1829. 49

Several persons who had claims on the Government of the United States, for injury done to their property, taken and used to prevent the approach of an enemy, employed an agent to collect their evidence, and prosecute their demands; but, before the matter was finally adjusted, one of them died. After this, the representative of the deceased, the defendant, attended several meetings of the persons interested in the said claims, at which it was always stated, that the plaintiff was acting as the agent of the owners of the property taken in prosecuting their claim. The defendant also gave the plaintiff a letter of introduction, in which he was mentioned as the "representative of the unfortunate owners" of

the property, for which indemnity was sought; and the person to whom it was addressed, was requested to aid the plaintiff in obtaining redress. One of the witnesses also proved, that in frequent conversations with the defendant, he, the witness, had stated that twenty per cent. was the commission stipulated to be paid by the owners of the aforesaid property; and that the defendant never objected to the same. The plaintiff attended to the agency until the passage of a law, under which the defendant was paid, as executor. In an action by the agent for the recovery of compensation for his services, *held*, that it was properly left to the jury to determine whether there was any new contract between the plaintiff and defendant, after the death of the original owner, by which the defendant would be liable in his individual capacity.

APPEAL from Baltimore County Court. This was an action of assumpsit, instituted on the 21st of April, in the year 1824, by the appellee, (the plaintiff in the Court below,) against the appellant, (the defendant in that Court.)

The declaration contained counts, for work and labor, and materials found; for use and occupation; for matters properly chargeable in account; for goods, wares, and merchandise; for money lent, and advanced, money had and received; and on an *insimul computassent*.

The defendant pleaded, 1st. *Non assumpsit*. 2nd. *Non assumpsit infra tres annos*; and 3d. *actio non accrevit*.

Issue to the 1st plea, and general replications, and issues to the 2d and 3d pleas.

50 At the trial, the plaintiff gave in evidence, that George * Stiles, in his life-time, being the owner of three vessels that were sunk at the entrance of the harbor of Baltimore, in order to obstruct the approach of the ships of the enemy to the City of Baltimore, during the late war between Great Britain and the United States, did sometime in the year 1816 or 17, and during the life of said Stiles, unite with several other owners whose vessels had likewise been sunk, in a petition to Congress for compensation of the loss occasioned thereby; and that the said Stiles, in conjunction with the said owners, appointed the plaintiff in this cause, to obtain and collect documents and evidence in support of the claims of the said petitioners, and to prosecute the said petition before Congress, by proceeding to the City of Washington, with the necessary documents and proofs to establish the justice of said claim for compensation, and that the said plaintiff should be entitled to receive, as a reward for his services aforesaid, at the rate of twenty per cent. on the amount recovered. The plaintiff further offered evidence, that the said George Stiles died in the year 1819, and before any decision had been made by Congress on the subject of said petition; that sometime subsequent to the death of said George Stiles, and after the defendant had taken out letters testamentary on his estate, he, the defendant, attended several meetings of the aforesaid owners, on the subject of the aforesaid petition, in which it was always stated, that said Causten was acting as the agent of said owners in prosecuting

the petition aforesaid. And further, that the defendant wrote the following letter, which he addressed to Commodore Rodgers, at the City of Washington: "Baltimore, 1st February, 1821. Commodore John Rodgers: My dear Sir,—Permit me the pleasure of introducing to your acquaintance, my friend, Mr. James Causten, who visits your city on the subject of the vessels so prudently and efficaciously sunk in this harbor on the ever memorable September, 1814. Mr. Causten goes as a representative of the unfortunate owners, who, you know, have ever since been refused a fair * compensation for the very heavy damages sustained, and must beg the favor of you **51** to grant him such friendly advice and information as you may deem calculated to aid him in this very deteriorated business. Yours, with great respect, and pure regard, John S. Stiles." The plaintiff also offered evidence by Robert Barry, that he had had frequent conversations with the defendant, in which he stated that twenty per cent. was the commission stipulated to be paid by said owners, and that the defendant never objected to the same. He also offered in evidence the Act of Congress, making the compensation. And that the amount of loss ascertained, according to the provisions of said Act, to have been sustained by the destruction of said vessels, owned as aforesaid by said George Stiles, being between five and six thousand dollars, was duly paid to the defendant, as executor of said George Stiles, by the agents of the government, and that he has never accounted to the plaintiff for any part of the money so received, but has retained the whole amount. And the plaintiff, further to support the issue on his part, gave evidence to the jury, by legal and competent testimony, that he did collect the documents and proofs in the City of Baltimore, and elsewhere, which were necessary to support the claims of the petitioners, including those of the said George Stiles, and that he did, previous to the death of the said George Stiles in 1819, after said contract, proceed to Washington, and that since the death of the said Stiles, and since letters have been granted to the defendant, did as well collect other documents and evidence in support of said claim, as attend at Washington during several sessions of Congress, prosecuting the claims of the petitioners and of the defendant, until the passage of the law of Congress aforesaid, by which the claims of the petitioners were liquidated. Whereupon, the defendant prayed the Court to instruct the jury, that, 1st. If the jury shall believe, from the evidence in the cause, that George Stiles, in his life-time, contracted with the plaintiff for his services as an agent in prosecuting claims for compensation alleged * to be due, for the destruction of certain vessels **52** owned by the testator in his life-time, and for which he was to receive at the rate of 20 per centum, and that he continued to act in virtue of that agency, after the death of said George Stiles, in pursuance of said contract, then the plaintiff is not entitled to re-

cover in this action; which opinion the Court [ARCHER, C. J.] gave. Thereupon the defendant further prayed the opinion of the Court, and their direction to the jury, that there is not sufficient evidence in the cause, to shew that any new contract was made between the plaintiff and the defendant, after the death of George Stiles, by which the plaintiff is entitled to recover in this cause from the defendant, in his individual capacity. And the defendant further prayed the opinion of the Court, that if the jury believe that the claim set up in this case was on a contract for procuring a law of Congress, then the same is against public policy and void; both of which opinions the Court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Meredith, for the appellant, referred to *Davis vs. Davis*, 7 H. & J. 36; *Morris vs. Brickley*, 1 H. & G. 107.

R. Johnson and Evans, cited *Davis vs. Davis*, 7 H. & J. 39; *Morris vs. Brickley*, * 1 H. & G. 109; *McElderry vs. 53 Flannagan*, 1 b. 321; 2 *Stark. Evid.* 83; 4 *Maule and Selw.* 277; *Howard vs. Baillie*, 2 H. Blk. 622; 2 *Stark. Evid.* 117; 1 *Ohitty Plead.* 337; *Webber vs. Tivill*, 2 *Saund.* 122, (note 2;) *Bank of Washington vs. Triplett*, 1 *Peters*, 25.

DORSEY, J. delivered the opinion of the Court. The only question for our consideration is, was there any evidence to be left to a jury, of a contract between John S. Stiles, the executor of George Stiles, and Causten, the appellee, by which the latter was employed by the former as agent for the prosecution of the claim, which might be made on the United States, for the injury done to the vessels of the testator, sunk during the late war, for the preservation of the City of Baltimore. We concur with the opinion of the County Court, that there was. Putting out of view the fact, that such a contract was entered into between the testator, in his life-time, and Causten, and it is unquestionable, from the proof in the cause, that a jury might, nay, ought to infer the existence of an agreement of this kind, between the appellant and appellee. Upon no other principle can a solution be given to the acts of John S. Stiles. The right of the jury to draw this inference, is not taken away by proof of a contract between the testator and Causten, of which there is no legal proof that John S. Stiles had any knowledge. The fact of such knowledge, is a matter for the jury to decide upon, after deliberating on all the circumstances in testimony before them. The inference of its existence is not self-evident, or so undeniably true, that the human mind could not doubt on the subject. The County Court were right, therefore, in submitting it to the consideration of the

jury. We mean to decide simply the question before us; and to intimate no opinion, as to the appellee's right to recover on the count for money had and received, in case all his * services as agent, had been rendered under his contract with George Stiles, the testator. 54

Judgment affirmed.

ROGERS' Lessee vs. RABORG AND REDDING.—December, 1829.

It is a settled rule of evidence, that if a person who has been regularly sworn and examined on the ground, upon a survey executed in an action of ejectment, dies before the cause is tried, or leaves the State, and goes to parts unknown and without the reach of the process of the State, so that his attendance as a witness cannot be procured, his deposition so taken, and returned with the plots, may be read in evidence at the trial from necessity. (a)

So the deposition of a witness sworn and examined under the same circumstances, and who had become paralytic since his examination, and though regularly summoned, was unable to leave his house, or to speak so as to be understood, may also be read in evidence at the trial, for the same reason.

Locations made by a lessor of the plaintiff in an action of ejectment, as, and for his claim and pretensions to a tract of land, being transferred to the plots in another action of ejectment, brought against those claiming under the lessor in the first action, and who took defence for the same tract in the second action, are competent, though not conclusive evidence for the plaintiff in the second action, to shew the true location of such tract, although the first action was dismissed. (b)

Where boundaries called for in a grant can be established, it is a settled principle of construction, that the courses and distances expressed, are to be disregarded, and the lines run to the boundaries, according to the calls.

The patent for a tract of land described it as follows: "lying in the county aforesaid, on the head of the N. W. branch of P. river, and joining the S. W. side of B. town, and on a tract of land called L. beginning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of B. town, and running then thence, &c." the different lines by course and distance, without calls. *Held*, that upon the true construction of this patent, neither the first, nor any other line of the tract granted by it, has a call to the first, or any other line of the tract called L. and that the word "joining," as there used, is not of such imperative and binding force, as that the said tract must be so located as to join L. but that the beginning tree being ascertained, the location of the land from that tree, must be governed by the particular description given in this case, by courses and distances, they having no calls or binding expressions to control them.

(a) Cited in *Matthews vs. Dare*, 20 Md. 267. See *Weems vs. Disney*, 4 H. & McH. 105, note; *Howard vs. Moale*, 2 H. & J. 220; *Bowie vs. O'Neale*, 5 H. & J. 183.

(b) See *Jarrett vs. West*, 1 H. & J. 308.

55 * APPEAL from Baltimore County Court. Ejectment for a tract of land called "Widow's Assistance,"

The declaration contained a count on the demise of Philip Rogers, the lessor of the plaintiff, on the 1st of February, 1822, for fifteen years. The defendant, the appellee, appeared, entered into the common rule, took defence on warrant, and pleaded not guilty, to which issue was joined. A warrant of resurvey issued, and plots were returned. The defendant took defence for a tract of land called "Deep Point."

1. At the trial, the plaintiff read in evidence to the jury, the patent for the tract of land called "Widow's Assistance," granted to Henrietta Rogers, on the 13th of January, 1767, and proved that Henrietta Rogers, the patentee, died in the year 1790, when said land descended to the lessor of the plaintiff, as her heir-at-law. And also, that said land was held and claimed by them, and partly occupied by the tenants of the said Philip, until the year 1819, when the defendants extended their fence within said land, as denoted by three black dots, as shown on the plots in this cause. The plaintiff also gave evidence, that one Jacob Brown, had been sworn and examined, as a witness for him upon the survey made in the cause; that he had at that time shown to the sheriff and surveyor, the objects and matters, stated in the surveyor's explanations to have been shown by said Brown, and located on the plots in this cause, as so shown; and also gave evidence, that the deposition in writing of said Brown, was taken by the sheriff upon the said survey, which deposition was returned to the Court by the sheriff, with the plots; and also, that said Brown had been regularly summoned to attend this Court as a witness for the plaintiff in this cause. And further gave evidence, that since the taking of said deposition, the said Jacob Brown had become, and still is, afflicted with a paralytic disease, which renders him unable to leave his house, and unable to talk so as to be understood; and the plaintiff thereupon offered to read the deposition of said Jacob Brown in evidence, to which the

56 defendants objected, * and the Court, [HANSON, A. J.] being of opinion that said deposition was inadmissible, refused to let it go to the jury. The plaintiff excepted.

2. The defendants then read in evidence to the jury, the patent of a tract of land called Deep Point, granted to John Frazier, on the 20th of February, 1749, which said patent contains the following expressions: "We do therefore hereby grant unto him, the said John Frazier, all that tract or parcel of land called Deep Point, lying in the County aforesaid, on the head of the north-west branch of Patapsco River, and joining the south-west side of Baltimore Town, and on a tract of land called Lunn's Lot, beginning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of Baltimore Town, and running thence, &c." And then made title to the said tract of land, by sundry mesne con-

veyances, through and under one Alexander Frazier. Whereupon the plaintiff offered to read in evidence, a duly attested copy of the record of proceedings in an action of ejectment, and of the plot and certificate of explanations therein, instituted by the said Alexander against Cornelius Howard and the said Henrietta Rogers, for the recovery of the same land called Deep Point, in the Provincial Court of Maryland, in the year 1772, in which the aforesaid tract of land is located, as the claim and pretension of the plaintiff in the action, for the purpose of showing by said plot and explanations, that said tract called Deep Point, was then surveyed and located by said Frazier, in that suit, in the same manner and position, as it is located on the plots in this cause; the plaintiff at the same time offering to prove by the surveyor, who made the plots in this cause, that the present location of the land, was transferred, and made from the locations of the same, as made on the plot in the proceedings so offered to be read in evidence; and further to show, the true original location of said tract of land. The defendants objected, and the Court, [HANSON, A. J.] was of opinion, that the matters so offered in evidence, were inadmissible in law, for any of the purposes * stated; inasmuch as it appeared by the copy of the proceedings, that said Frazier had suffered a non-suit in said action 57 notwithstanding it appeared also, by said proceedings, that the judgment of non-suit therein, was rendered against said Frazier, for his default in not giving security for the costs, which the Court had ruled him to give, and refused to permit the evidence to go to the jury. The plaintiff excepted.

3. The plaintiff, in addition to the evidence by him given and offered in the preceding bills of exceptions, gave in evidence, that a certain Philip Hall, in the year 1782 and 1783, being in possession of, and claiming title to said land, called Deep Point, executed leases for the several lots of the same land, fronting on the north side of Pratt street, which are located on the plots in this cause, to the persons whose names are written on the said lots, on which houses were erected by the lessees, as located on said plots; and that in the said leases, the said Hall calls and describe the lots to be, and to begin respectively at the number of feet therein expressed, East from where the first line of Deep Point intersects the North side of Pratt street, and that the said number of feet, in said leases severally expressed, as their several places of beginning, being reversely measured, extend from the said respective lots on the North side of Pratt street, and terminate at the red circle, on the plots aforesaid; and further proved, that Alexander McKensie, under whom the defendants claim, having become seized and possessed of said Deep Point, under the said Alexander Frazier, did, in the year 1818, sell and convey one of the aforesaid lots, which had been leased by said Hall, to John Mickle, and in the conveyance therefor, said McKensie describes the said lot to begin on Pratt street, at the distance of 52

feet East from the place where the first line of Deep Point intersects Pratt street; and also proved that 52 feet measured reversely from the beginning of said lot, would extend to the North side of Pratt street, and terminate at the said red circle; the purpose of which

58 evidence was, to show, * that the location of the said first line of Deep Point, as shown and claimed by said Alexander Frazier in the aforesaid action, at the time thereof, was, and is the same, as that which the plaintiff hath given said line in this cause; and to show that the position and location of the said first line at its intersection, or crossing the North side of Pratt street, as claimed and described by said Hall, in the leases aforesaid, and as claimed and described by said McKensie, in his conveyance aforesaid, was, and is the same, as that which the plaintiff has given said line in the location thereof in this cause; and also to show the true original location of said line and land. Whereupon the defendants produced and read in evidence to the jury, a patent for a tract of land called Lunn's Lot, granted to Edward Lunn, on the 20th of July, in the year 1673, and shewed the Court, from the plots in this cause, that the 16th line of Lunn's Lot, as located from red A, on said plots in two ways, as shewn on said plots, and also, that Deep Point is located by them, as shewn on the plots, running its first line the entire length thereof, from red A, to red 126, with the said sixteenth line, according to the second location of that line, and that there is no other location of Deep Point on the plots, which runs the first line thereof, its entire length with the said sixteenth line. Thereupon the defendants prayed the opinion of the Court, and their direction to the jury, that inasmuch as Deep Point, if run course and distance, will run into Lunn's Lot, as located by both plaintiff and defendant, and the grant of Deep Point, properly construed, calls to join on Lunn's Lot, that the first line of the tract called Deep Point, must run with an outline of Lunn's Lot, the extent of the distance of the first line of Deep Point; and the residue of the tract must be located, course and distance, with such an allowance for variation, as the jury might deem proper to make; and inasmuch as Deep Point, thus located, binding on Lunn's Lot, as located by either the plaintiff or defendant

59 on the plots, covers the whole land in controversy in this cause, * that the plaintiff is not entitled to recover; to which construction of the patent of Deep Point, the plaintiff objected, and showed to the Court, by the plots in this cause, that the defendants claim, for the tract called Deep Point: in their defence taken in this cause, a different position from that so taken. The Court [HANSON, A. J.] gave the following direction to the jury: the tract of land called Deep Point, must, in its first line, run joining on Lunn's Lot, the entire length of said line, and cannot run into it; and there being but two locations of Deep Point in this manner, by either of which, the claims and pretensions of the plaintiff, are covered by

Deep Point, to which he sets up no title, the plaintiff is not, entitled to recover.

The plaintiff excepted; and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

H. W. Rogers, for the appellant, cited *Howard vs. Moale*, 2 H. & J. 372; *Bowie vs. O'Neal*, 5 H. & J. 226; *Stewart vs. Mason*, 3 H. & J. 507; *Jarret vs. West*, 1 H. & J. 503; *Mason vs. Stewart*, * 3 H. & J. 507; *Ridgely vs. Ogle*, 4 H. & McH. 123. 60

Mayer, for the appellees.

BUCHANAN, C. J. delivered the opinion of the Court. This case is brought before us on three bills of exception taken at the trial; the first of which is to the refusal of the Court to permit a deposition, which was offered in evidence, to be read to the jury.

It is a settled rule of evidence in this State, that if a person who has been regularly sworn, and examined on the ground, upon a survey executed in an action of ejectment, dies before the cause is tried, or leaves the State, and goes to parts unknown, and without the reach of the process of the State, so that his attendance as a witness cannot be procured, his deposition so taken and returned with the plots, may be read in evidence at the trial from necessity, and being taken too by authority, and with the privilege and advantage of cross examination extended to the opposite party. Here the foundation laid for letting in the deposition of the witness, which appears to have been regularly taken on the survey, and returned with the plots, was, that he had since become paralytic, and though regularly summoned as a witness, was unable to leave his house, or to speak so as to be understood. He was not indeed dead, nor had he gone out of the State, beyond the reach of the process of Baltimore County Court, in which the action was depending; but he was dead to all the purposes of giving evidence in a Court of justice, and the benefit of his oral * testimony at the bar, was as much lost to the party, as if he had, in fact, been dead, or had left the State. 61

The necessity, therefore, of resorting to his deposition, was the same as if he had been dead, and the reason being the same, we think it ought to have been admitted. And more strongly than if he had left the State; his inability to give evidence being produced by the act of God, leaving to the party requiring the benefit of it, no means of obtaining it, and without any negligence or fault on his part, which may not always be strictly the case, in relation to a witness who has left the State.

We differ, too, with the Court below, in the opinion presented by the second exception, and think that Court erred in not permitting

the appellant to give in evidence to the jury, the locations made by Alexander Frazier, in an action of ejectment brought by him against Cornelius Howard and Henrietta Rogers, for the tract of land called Deep Point, as, and for, his claim and pretensions.

Henrietta Rogers was the patentee of the tract called Widow's Assistance, for which this suit was brought, and Philip Rogers, the lessor of the plaintiff, (who is the appellant,) is her son and heir-at-law, and claims under her. John Frazier, under whom Alexander Frazier claimed, was the patentee of Deep Point, and Raborg and Redding, the defendants, (who are the appellees,) claim under Alexander Frazier. The location of Deep Point, as made by Alexander Frazier, as and for his claim and pretension on the plats returned in the action, brought by him for that tract of land, against Howard and Henrietta Rogers, is transferred from those plots, to the plots returned in this cause. Deep Point being the elder tract, the right of the appellant to recover, depends, as that of Alexander Frazier did, in his action against Howard and Henrietta Rogers, upon the true location of that tract. And if that suit had proceeded to trial and verdict, and this was a case between Henrietta Rogers and Alexander Frazier, it cannot be doubted that the plots returned in that case,

62 * and the location thereon by Frazier of Deep Point, might be given in evidence against him; it is the every day practice. And as little can it be doubted that the same evidence might be given by the heir-at-law of Henrietta Rogers, against those claiming under Alexander Frazier. But it seems to have been thought inadmissible, because Alexander Frazier did not prosecute his suit against Howard and Henrietta Rogers to a trial, but suffered a non-suit to be entered. The force of this objection we do not distinctly perceive; the evidence offered was not as a judgment on the merits against Frazier, but only to show his own views, in relation to the true location of the land he claimed. The declarations, or admissions of a party to a suit, may always be given in evidence against him; why then may not his more solemn acts, such as a deliberate location of a tract of land, claimed by him, upon plots returned in a suit brought for the recovery of it, showing his own opinion of its true location, with which he may be supposed to be acquainted? We do not say it would be conclusive evidence against him, or those claiming under him, in any subsequent suit involving the location of the same land; it certainly would not. But we think it clearly admissible, as a fact evincing his sense at the time, touching the proper location, as much so as any other act, declaration, or admission of his could be.

The question presented by the third exception, arises on the construction of the patent for the tract of land called Deep Point. The expressions in the patent, to which we are called upon to give a construction, are "lying in the county aforesaid, on the head of the north-west branch of Patapsco River, and joining the south-west side of Baltimore Town, and on a tract of land called Lunn's Lot, begin-

ning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of Baltimore Town, and running thence, &c.” the different lines, courses and distances without calls. It is contended, that the expressions used must be understood to mean * “joining on Lunn’s Lot,” and that the patent for Deep Point must be so construed, as that by force of the word *joining*, Deep Point cannot be located so as to run into Lunn’s Lot, but that the first line must, to its whole extent, run with and adjoining to, an out line of Lunn’s Lot; and it was so adjudged by Baltimore County Court. **63**

But we do not perceive any thing in the language of the patent that we think will sustain such a construction. Where boundaries called for in a grant can be established, it is a settled principle of construction, that the courses and distances expressed, are to be disregarded, and the lines run to the boundaries, according to the calls. But what boundaries are called for here? Neither the first, nor any other line of Deep Point, has a call to the first or any other line of Lunn’s Lot, but each is expressed to run a certain course and distance, without any call; and if it be admitted that Deep Point must be so located to adjoin Lunn’s Lot, what is there to confine that junction to the first, more than any other line? Or with what line of Lunn’s Lot is the junction to be made? That, indeed, is not professed to be ascertained; but the argument is, that the first line of Deep Point must join, and run its entire length with some out line of Lunn’s Lot, which would seem to be entirely arbitrary. The part or line of Deep Point to join Lunn’s Lot, is no more designated than the part or line of Lunn’s Lot to be joined; and the expression joining in the patent, would be as fully gratified by a joining at one point, as at another. And if the tree called for as the beginning tree of Deep Point, does not stand on a line of Lunn’s Lot, it would be impossible to run the first line of Deep Point in its whole extent with, and adjoining a line of the latter tract; but a course would have to be shaped to strike it, which would be to add a line to Deep Point, and to change the course and distance of the first line, without any express call to authorize it, and to leave the point of termination of that line altogether uncertain, in the place of the course and distance clearly *expressed, contrary to the ordinary office of calls, which are usually preferred for greater certainty. **64**

But we think the patent for Deep Point will not admit of such a construction; and that the word joining, as there used, is not of such imperative and binding force, as that, that tract, of land must be so located as to join on Lunn’s Lot, and cannot run into it. It seems to us that the expression used, makes no part of the description of the land itself, or of its metes and bounds, but was intended only as a general *designatio loci*, where it was supposed to lie; and that the beginning tree being ascertained, the location of the land from that tree, must be governed by the particular descrip-

tion given by courses and distances, they having no calls or binding expressions to control them.

Judgment reversed, and procedendo awarded.

ROGERS, Surviving Executor of YELLOTT vs. WATERS.—December, 1829.

A promissory note given by a member of the vestry of a church, for a debt due, not by him in his individual character, but by the vestry, a corporate body, of which he was a member, without any consideration moving to himself, is a promise to pay the debt of another, without consideration, and void. (a)

The fact, that a note was payable at a future day, where it appeared that it was made for the purpose of closing an account, for which the maker was not responsible independent of the note, does not furnish the slightest presumption that forbearance was purchased by it; for nothing is more common than the closing of accounts by passing notes payable at future days, without the consideration of forbearance being thought of.

The acknowledgment of a defendant, that the promissory note upon which he was sued as maker, was originally given to close an account, which the payee and plaintiff had against the vestry of a church, of which he, the defendant was a member; and that the money arising from the pew rents was to have been applied to the payment of the same, but that it never had been paid, is not sufficient to take the case out of the Statute of Limitations. It shows that there never was an existing debt due from * the defendant; and that when the note was given, it was
65 not to be paid by him, but out of the money arising from the pew rents, which exempts him from any moral obligation to pay. (b)

Where a plaintiff gives in evidence a letter from the defendant, to avoid the Statute of Limitations, he must take the letter as it is.

APPEAL from Baltimore County Court. This was an action of assumpsit, by the appellant, Philip Rogers, as surviving executor of Jeremiah Yellott, against the appellee, Hezekiah Waters, docketed by consent on the 12th of May, 1823.

The declaration contained a count on a promissory note for \$211.62, dated December 17th, 1804, of which the appellee was the maker, and payable six months after date, to the plaintiff's testator. There were also counts for money had and received, paid, laid out, and expended; and a count on a promise by the defendant, to the plaintiff as executor, in consideration of the said sums of money, due as aforesaid, to the plaintiff's testator.

The defendant pleaded, 1st. *Non-assumpsit*. 2nd. *Non-assumpsit infra tres annos*. 3d. *Actio non accrevit infra tres annos*. Issue to

(a) See *Wyman vs. Gray*, 7 H. & J. 296, note.

(b) See *Oliver vs. Gray*, 1 H. & G. 148, note.

the first plea; and general replications to the 2nd and 3d pleas, and issues joined.

At the trial, the plaintiff gave in evidence, that the defendant signed and delivered to the plaintiff's testator the following promissory note: "\$211.62; Baltimore, 17th December, 1804—Six months after date, I promise to pay to Jeremiah Yellott, or order, two hundred and eleven dollars, and sixty-two cents, for value received. Hezekiah Waters." And also gave in evidence that letters testamentary were, in due form of law, granted to the plaintiff and one Samuel Owings, now deceased, and whom the plaintiff hath survived, as executor of said testator; he also offered in evidence the following letter, which was written by the defendant, and delivered to the plaintiff: "Baltimore, October 22d, 1822. Mr. Philip Rogers, Sir: The note in your possession, with my signature, originated in the * following manner, viz: On settlement of an account with 66
Capt. Yellott, some time in the month of February, 1804, there appeared a balance due him of about \$211, being money disbursed and laid out by him in the completion of St. Peter's Church, to close which, it was agreed by the vestry and Capt. Yellott, that some one of the vestry should sign a note for the balance, payable six months after date, and it was finally concluded, that myself, as one of the vestry, should sign that note, and that money arising from the pew rents, should be applied to the payment of the same. Capt. Yellott held this note for more than six months after the time limited for payment, and till the time of his decease, without ever demanding payment, or mentioning any thing on the subject, which induced a hope that he intended to make it a present to the church, he being a vestryman during all this time, if I mistake not. Several years after the decease of Capt. Yellott, Mr. Samuel Owings, one of his executors, mentioned to me that he had this same note in his possession. I informed Mr. Owings in what manner it originated, and at the same time told him, that I would press the vestry to raise the money, and to have it taken up. I accordingly several times mentioned the subject to the vestry without effect, there never being money in the treasurer's hands to meet the current expenses of the church, which several gentlemen in the present vestry must well recollect, as they were members of the former vestries for many years, and till the unpleasant revolution which took place in 1815-1816, since which time I have had very little communication with them. I am under the impression that Mr. Wm. Jessop, Mr. Wm. Krebs, and Francis Hollingsworth were all present at the time of the statement of the account alluded to above, and that Mr. Hollingsworth acted as secretary at the time, and could the book in which Capt. Yellott kept the church account be produced, the record made at that time would explain the whole transaction. The foregoing is a just and true statement of this unpleasant business, therefore cannot * sup-
pose that the administrators of the church property would 67

wish to involve me in trouble, as it is most evident that this money was expended on the church, and has never yet been paid. Would you be pleased to see Mr. F. Hollingsworth on the subject; I am confident he must recollect the transaction, and if I am not mistaken, the note in question is in his hand-writing, Hez. Waters." And that the said testator died in the month of February, in the year 1805, and that letters testamentary were granted the said Samuel and Philip, on the first of March of the same year. Whereupon, the defendant moved the Court to instruct the jury, that if they shall believe the evidence so given as aforesaid, that then the said note was given without a sufficient consideration therefor, moving from the said Yellott to the defendant, and therefore does not create a debt or obligation in law upon the defendant, to pay the money in said note mentioned; and also that the said matters so offered do not afford sufficient evidence of his admission or acknowledgment of being indebted, or of his promise to pay any existing debt, and therefore is not sufficient to take this demand out of the operation of the Statute of Limitations, pleaded in this cause; of which opinion on the Statute of Limitations the Court [HANSON, A. J.] was, and so directed the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

H. W. Rogers, for the appellant, cited *Oliver vs. Gray*, 1 H. & G. 216.

S. I. Donaldson, for the appellee, cited *Wyman vs. Gray*, 7 H. & J. 409; *Elliott vs. Giese*, 1b. 457; *Oliver vs. Gray*, 1 H. & G. 204.

An acknowledgment of a debt, which will take a case out of the Statute, must be unqualified and unconditional. *Wetzell vs. Bussard*, 11 Wheat. 309; *Clementson vs. Williams*, 8 Cranch, 72, and unaccompanied with a protestation against the payment of it. *Johnson vs. Burdlee*, 15 Johns. 3, and no promise to be inferred from declaration of defendant, that he was not holden to pay. *Lawrence vs. Hopkins*, 13 Johns. 288; *Bell vs. Morrison*, 1 Pet. 360; *Leeper vs. Talton*, 16 East, 421; *Wayne vs. Warlters*, 5 East, 10.

70 * BUCHANAN, C. J. delivered the opinion of the Court. This case appears, under former decisions of this Court, to be clear of difficulty.

It is an action of assumpsit, brought upon a promissory note given by the defendant to Jeremiah Yellott, the appellant's testator, on the 17th of December, 1804, and payable six months after date, more than twenty years before the bringing of the suit. The issues are upon the pleas of *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*.

To support the issues on his part, and to take the case out of the operation of the Act of Limitations, the appellant produced and

read to the jury, a letter addressed to him on the 22nd of October, 1822, by the defendant, in which he admits that the money for which the note was passed, has not been paid, but alleges, that under an arrangement between Jeremiah Yellott and the Vestry of St. Peter's Church, to which body both he and Yellott belonged, it was given in order to close the account for a balance due to Yellott, on account of money laid out by him in the completion of the church, to be discharged by the application to that purpose, of money arising from the pew rents.

In the case of *Wyman vs. Gray*, 7 H. & J. 409, decided by this Court, it was determined, that a note given by an individual corporator, for a debt due by the corporation, and not by him in his individual capacity, and without any new or superadded consideration moving to himself, was a promise to pay the debt of another, and void, there being no sufficient consideration to support it.

Here the letter of the defendant is the evidence produced and relied on, by the appellant himself, and that letter * proves, that the note, which is the subject of the suit, was given for a debt due, not by him in his individual character, but by the Vestry of St. Peter's Church, a corporate body, of which he was a member, but without any consideration moving to himself. It is therefore a promise to pay the debt of another, without consideration, and *nudum pactum* and void. And the question presented by the bill of exception, is, whether the letter of the defendant had the effect to take the case out of the operation of the Act of Limitations? 71

In *Oliver vs. Gray*, decided by this Court at the June Term, 1827, it was held, that an acknowledgment to take a case out of the Act of Limitations, must be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt a defendant from a moral obligation to pay; and that an admission, that the sum claimed has not been paid, is not sufficient without some further admission, or other proof, that the debt once existed. In this case, the defendant does, in this letter, acknowledge that the sum claimed has not been paid, but at the same time he insists, that the note was not given for a debt due by himself, but by the Vestry of St. Peter's Church, under an agreement between the vestry and Yellott, that it should be signed by him to close the account, but to be paid out of money arising from the pew rents. There was no consideration moving to the defendant, nor any antecedent debt due by him individually; no consideration of forbearance expressed in the note, as the consideration upon which it was given, as has been supposed. Nor is there any evidence of such a consideration, *de hors* the note. It is, to be sure, made payable six months after date, but it was given (according to the appellant's own proof, as contained in the defendant's letter, which, as he has introduced it, he must take it as it is) for the purpose of closing account, on the settlement of which that amount was found to be due to him from the Vestry of

St. Peter's Church, which by no means proves, or furnishes the slightest * presumption, that the forbearance of Yellott to sue
72 the vestry, was purchased by the giving of that note; on the contrary, if we were to deal in conjecture, it would rather seem, that the favor, if any, was a favor to him, in thus closing an account open upon the books. And perhaps nothing is more common than the closing accounts by passing notes, payable at future days, without the consideration of forbearance being thought of. To suppose that it was given for the consideration of forbearance, looking to the note itself, would be to give to it a construction unauthorized by any thing appearing upon the face of it, and to offer violence to the evidence, which asserts that it was given for the purpose only of closing an open account, and being the acknowledgment of the party offered by the appellant to take the case out of the Act of Limitations, and the only evidence in the cause, except the note itself, he must be content to take it altogether, as it stands, and cannot garble it, and select such parts as will suit his purposes, and reject the residue; otherwise it would be to take the case out of the Act of Limitations by other proof than the acknowledgment of the defendant, and that cannot be: which would be the effect of the remote inference, that the note was given for the consideration of forbearance, drawn from the mere circumstance that it is made payable at a future day, in opposition to the allegation that the object of it was to close the account between Yellott and the vestry, and that it was to be paid out of money arising from the pew rents; which shows that the payment of it by him individually, was not contemplated by any of the parties.

That part of the letter relied upon, is in these words: "On settlement of an account with Capt. Yellott, some time in the month of February, 1804, there appeared a balance due him of about \$211, being money disbursed and laid out by him in the completion of St. Peter's Church, to close which, it was agreed by the vestry and Capt. Yellott, that some one of the vestry should sign a note for the
73 balance, payable six months after date; and it was finally * concluded, that myself, as one of the vestry, should sign that note, and that money arising from the pew rents, should be applied to the payment of the same."

The note then, being a promise, or agreement to pay the debt of another, and void for want of a sufficient consideration moving to the defendant, there never was an existing debt due by him; and his acknowledgment that the sum claimed has not been paid, is not an admission of any present subsisting debt. And the understanding at the time the note was given, that it was not to be paid by him, but out of money arising from the pew rents, exempts him from any moral obligation to pay it. I think, therefore, that the acknowledgment of the defendant, was not sufficient to take the case out of

the Act of Limitations, and that the direction given to the jury was right.

Judgment affirmed.

WINCHESTER, Trustee of WILLIAMS vs. THE UNION BANK OF MARYLAND.—December, 1829.

In a suit by a trustee of an insolvent debtor, claiming in his character of trustee, a general issue plea does not admit the character in which the plaintiff sues.

To establish the right of such a trustee, the plaintiff, under the general issue, must prove every thing essential to the showing himself clothed with the character and authority of a trustee, which cannot be done by the production of the certificate of the commissioners of insolvent debtors, and the final discharge of the insolvent only, but all the proceedings must be exhibited.

The different insolvent laws of this State constitute one general system and must be construed together; and so construed, require a bond with security to be given, before a trustee can act as such, without which, he cannot be invested with the character and rights of a trustee. To * establish his character as trustee, and his right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given, by proof of the bond itself. (a)

74

APPEAL from Baltimore County Court. This was an action of assumpsit brought by the appellant, as trustee of James Williams, against the appellees, the president and directors of the Union Bank of Maryland. The declaration contained a count for goods, wares, and merchandise, sold and delivered; for money paid, laid out, and expended; money had and received; and on an *insimul computassent*. *Non assumpsit* was pleaded, and issue.

At the trial, the plaintiff offered in evidence the insolvent papers of James Williams, consisting of the petition of the said James Williams to one of the Judges of Baltimore County Court, setting forth his actual confinement in the gaol of Baltimore County, for debts which he was unable to pay, and his willingness to deliver up his property to the use of his creditors. This petition was accompanied with "a list of debts due by James Williams:" "of debts due, and property belonging to James Williams," and an affidavit of their truth; proof of Williams' residence in the State for the two years next preceding his application; the certificate of the sheriff of Baltimore County, of said Williams being in actual confinement for debt alone, with the reference of the application by the Judge aforesaid, to the commissioners of insolvent debtors; the bond of James Williams, with security for his appearance before the commissioners,

(a) Cited in *Hall vs. Sewell*, 9 Gill, 153; *Speed vs. Smith*, 4 Md. Ch. 309; *Wilson vs. Ireland*, 4 Md. 449.

78 Court at June Term, 1828, in which it * was held, that in a suit by a trustee of an insolvent debtor, claiming in his character of trustee, and not in his own right, a general issue plea does not admit the character in which the plaintiff sues, but that such a suit is analogous to the case of an assignee of a bankrupt claiming in that character; and that on the general issue, the plaintiff must prove every thing essential to the showing himself clothed with the character and authority of a trustee; which could not be done by the production of the certificate of the commissioners and the final discharge of the insolvent only, but that all the proceedings must be exhibited. That the different insolvent laws of the State constitute one general system, and must be construed together; and so construed, require a bond, with security, to be given by the trustee, before he can act as such, without which he cannot be invested with the character and rights of a trustee. That to establish his character as trustee, and right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given, by proof of the bond itself, and not by the production merely of the certificate of the commissioners, that the insolvent had complied with all the requisitions of the insolvent laws, and his final discharge; and that if he does not do so, the defendant is not driven to a plea in abatement, but may take advantage of it on the general issue. And we have heard nothing in the argument of this case to induce a departure from what was decided in the case of *Houck vs. Crouse*. We concur therefore, with the Court below, in the instruction given to the jury.

Judgment affirmed.

79 * WINCHESTER, Trustee of GOODING vs. THE UNION BANK OF MARYLAND.—December, 1829.

The trustee of an insolvent debtor derives his right from his appointment, and the insolvent laws requiring that he shall give bond with security, for the faithful performance of his duty, before he acts as such, until such bond is given, he is not invested with the functions of trustee, and can neither sue for, nor in any manner intermeddle with the property of the insolvent. (a)

So one appointed such trustee, having given bond after he brought suit, cannot maintain it.

APPEAL from Baltimore County Court. This was an action of assumpsit, instituted by the appellant on the 15th day of September, 1823, against the appellees, the president and directors of the Union Bank of Maryland. The pleadings and evidence were the same as in the preceding case of *Winchester, Trustee of Williams vs. The*

(a) Cited in *Wilson vs. Ireland*, 4 Md. 449; *Bank vs. Sharp*, 58 Md. 528.

Union Bank, with this difference, that after the commencement of the suit, and before trial, that is to say on the 28th of April, 1825, the appellant, as permanent trustee of John Gooding, filed a bond with approved security. The defendants made the same prayers, and obtained the same instruction from the Court as in the previous case, and the verdict and judgment being in their favor, the plaintiff appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

R. Johnson and Raymond, for the appellants, * cited the Act of 1805, ch. 110, sec. 4; 1808, ch. 71, sec. 3; 3 *Bac. Abr.* 80 *tit. Ex'r, &c.* 52; 5 *Jacobs' L. D. tit. Relation; Henderson vs. Parker*, 3 *H. & J.* 117.

Taney, (Attorney-General,) and *Kennedy*, for the appellees, referred to the Act of 1805, ch. 110; 1808, ch. 71, and 1812, ch. 77; 2 *Stark. Evid.* 109; 3 *Bac. Abr.* 53.

BUCHANAN, C. J. delivered the opinion of the Court. This case is, in all respects, the same as that of Winchester, trustee of Williams, against the Union Bank, just decided, with this difference only; that here a bond, with security, appears to have been given by the trustee, but subsequent to the bringing of the suit, though before the trial. And it is contended, in addition to the several points raised and decided in that case, that the bond thus given, has such relation back, as to entitle the plaintiff to recover.

But this is not like the case of an executor, who derives all his interest from the will; and though probate is necessary to the authentication of his right, yet it is the will alone which gives it, and the probate is only the legitimate evidence of his title. He may, therefore, sue, but cannot declare before probate, for he cannot assert his right in Court, as an executor, without producing his letters testamentary. It may, more properly, be assimilated to the case of an assignee of a bankrupt, who derives his title from the assignment, which divests the bankrupt of his personal property, and vests it in the assignee from the time of the bankruptcy; or in this particular, to the case of an administrator, who derives his title from his letters of administration, and cannot sue, or do any other act, before letters of administration granted, though when administration is granted, it vests the property in the administrator by relation, from the time of the death of the intestate.

So a trustee of an insolvent debtor derives his right from * his appointment; and the insolvent laws requiring that he shall give bond with security, for the faithful performance of his duty, before he acts as such; until such a bond is given, he is not invested with the functions of trustee, and can neither sue for, nor in any other manner intermeddle with the property of the insolvent. He is

not, in contemplation of law, a trustee; his character as such is not completed, until the bond required, is given. The mere appointment, unaccompanied by his giving a bond, with security, confers upon him no power over the goods of the insolvent; but it is the bond, as constituting an ingredient in the appointment, and is the perfection of it, that gives him authority to act, and assert his rights in the character of trustee.

The bond, therefore, in this case, having been given after the suit was brought, the suit was instituted when the plaintiff was not clothed with any power to sue, or in any manner to interfere with the property of the insolvent, in the capacity of trustee, and cannot be maintained.

Judgment affirmed.

HAMMOND *et al.* vs. STIER.—December, 1829.

Upon a petition by several heirs-at-law, certain real estate in which they were jointly interested, and which was not susceptible of a beneficial division among them, was decreed to be sold. A trustee was appointed; the land sold; and a report of the trustee, stating the proceeds of sale to be in his hands, was ratified and confirmed by the Court. Before the auditor had distributed these proceeds among the heirs, one of them who was a married woman, died. *Held*, That her surviving husband was entitled to her distributive share of the sale. (a)

APPEAL from Frederick County Court, as a Court of equity. In March, 1823, a petition was filed by the heirs of Vachel
82 * Hammond, formerly of Frederick County, deceased, setting forth that said Vachel died in December, 1821, seized and possessed of certain real estate in said county, which they pray may be sold, for the purpose of distribution among them, the same not being susceptible of division. The petition represented that some of the heirs were of full age, some *femes covert*, and some minors.

A decree at the same term accordingly passed, for the sale of said real estate, which sale was duly made and reported, (the report stating the proceeds to be in the trustee's hands) ratified and confirmed by the Court, at July Term, 1823. Afterwards, to wit, at August Term, 1826, the auditor of the said Court made his report, accompanied with an account between the estate of the said Vachel Hammond and the trustee, in which he allows "to the legal representative or representatives of Elizabeth Stier, deceased, wife of Frederick Stier, and who was one of the daughters and heirs of said deceased, (Vachel Hammond) the proportion coming to her from said estate," she the said Elizabeth Stier, having before that time de-

(a) Affirmed in *Jones vs. Plummer*, 20 Md. 420. Cited in *Betts vs. Wirt*, 3 Md. Ch. 115, and *Dalrymple vs. Taneyhill*, 4 Md. Ch. 174. See *Leadenham vs. Nicholson*, 1 H. & G. 189; *Hurt vs. Fisher*, *Ibid*, 60.

parted this life, leaving her husband, Frederick Stier, alive, and three children, minors, (who are the appellants in this cause.) On this report, the Court, [SHRIVER, A. J.] passed the following order: "Ordered, That the report of the auditor be, and the same is hereby ratified and confirmed; and that the trustee pay the proceeds accordingly, except the amount audited to the heirs of Elizabeth Stier, deceased, which the trustee is required to retain until the further order of this Court in the premises." At the same term a petition was filed by the said Frederick Stier, the appellee, the husband of Elizabeth Stier deceased, setting forth the proceedings on the aforesaid petition for the sale of Vachel Hammond's property. That on or about the 20th of March, 1825, the said Elizabeth Stier, the former wife of the petitioner, departed this life, intestate, leaving the petitioner, her husband, surviving her, and claiming in that character, in the same manner as if he had taken out administration on her estate, * her proportion of the proceeds of the said real estate of her father, Vachel Hammond.

83

It was admitted that Elizabeth Stier died intestate on the 20th of March, 1825.

A petition was also filed at the same term by the appellants, (by their next friend and guardian, Thomas Hammond) referring likewise to the before mentioned proceedings, for the sale of Vachel Hammond's real estate, and claiming the proportion of the proceeds thereof, to which the said Elizabeth Stier would have been entitled, as her infant children, and heirs at law, "the said proportion arising from the sale of real estate belonging to the said Elizabeth Stier."

The County Court (SHRIVER and TH. BUCHANAN, A. J.) on the 14th of November, 1826, ordered and adjudged "that the report of the auditor in said cause, be, and it is hereby ratified and confirmed; and further adjudged and ordered, that the trustee pay to Frederick Stier accordingly his wife's proportion of her father's estate, amounting, &c."

From this decree, the petitioners, Adeline Hammond *et al.* appealed to the Court of Appeals.

This case was submitted to the Court of Appeals, on the notes of counsel.

Tyson for the appellant, contended, that the County Court erred, because the estate of the said Elizabeth Stier, in the premises was real, or such as should, in a Court of equity, be regarded as real property, at the time of her death. It might be thought at first sight, but the case of *Rogers vs. Krebs*, 6 H. & J. 31, contains a decision in point. * This case was relied upon by this Court as their authority for adjudging that of *Leadenham vs. Nicholson*, 1 H. & G. 279. There, was a mutation of a *feme covert's* estate, from real to personal. The difference between the two cases, and the difference between this and the first cited case, is this: In the

84

first case, the bonds were given directly to the representatives, and in that way became *choses in action*, and of course reducible by the husband, or reduced into possession: in the two other cases, there was interposed between the parties a trustee, in whom the whole legal interest was vested. In the case now before the Court, how was it vested? As real estate. When did it cease to be real estate? surely not while the trusteeship lasted. When did that terminate? only when there was a fulfilment of the trust. It certainly did not terminate in this case, at the time of Elizabeth Stier's decease in 1825, nor was it terminated at the time of the audit. Will it be said that the nature of the trust was changed by the death of Elizabeth Stier? Certainly it was not in favor of the other parties beneficially interested. The fund was not real, as to them. How then could it be personal estate as to Elizabeth? Can a trustee support this double character? or can any thing but the extraordinary power of the Court of Chancery change the character of a trustee; can it be changed by circumstances?

The ground of the decision in the case of *Rogers vs. Krebs*, was, that the bonds were *choses in action*. The ground in this case of Frederick Stier's claim, must be the same. Can there be a *chose in action*, when there is no cause of action? and what cause of action had Elizabeth Stier at the time of her death in 1825; or did any cause of action accrue before the confirmation of the auditor's account in 1826. How could the husband become entitled to this as a *chose in action*? Under all the circumstances of the case, it is submitted, whether, at the time of Elizabeth Stier's death, she had any *chose in action*, or any personal interest * that could be
85 reduced into possession by her husband? If not, what subsequent act of her husband can make that a *chose in action* of Elizabeth Stier, which was not so at the time of her death.

A. Randall for the appellee, cited 2 *Pow.* 84; *State vs. Krebs*, 6 *H. & J.* 31; *Stevens vs. Richardson*, 6 *H. & J.* 156; *Jarrett vs. Cooley*, *Ib.* 258; *Leadenham vs. Nicholson*, 1 *H. & G.* 267; *Hurt vs. Fisher*, *Ib.* 88.

BUCHANAN, O. J. We consider the case of *Leadenham vs. Nicholson et al.* decided at June Term, 1827, as conclusive in this case, and
Affirm the decree.

86 * ALLENDER, Adm'r *d. b. n.* of WYSE vs. RISTON.—December, 1829.

W. died intestate in 1814, as to his personal estate. Administration was granted to his widow, who returned an inventory, and in 1816 settled an account with the Orphans' Court, in which she obtained credit for various payments. She, with several, but not all, of the deceased's

children, in 1822 united in a mortgage to the defendant, of some of the personal property which the intestate left, to secure the payment of a debt, for which the mortgagors were responsible to the defendant. The mortgage did not profess to be executed by the widow, in her representative character; and it did not appear that any of the intestate's debts remained unpaid. The widow died, and in 1823 the plaintiff was appointed administrator *d. b. n.* of W. and brought replevin against the defendant, who claimed the goods under his mortgage. *Held*, That inasmuch as strong circumstances existed in the case, to induce the presumption that the intestate's debts had been all satisfied, it was fair to infer that the administratrix had made distribution of the remaining assets, and acted in her character of distributee, in making the mortgage; that therefore the plaintiff was not entitled to recover. (a)

An inventory made and returned by an administrator to the Orphans' Court, after he has commenced an action for the recovery of the property included therein, is not competent evidence for him at the trial of the cause; for he might become personally liable for the costs of the suit.

The sheriff's schedule of goods returned, as taken and delivered in an action of replevin at the suit of R. may be read in evidence by the plaintiff, (who was one of the defendants in the replevin,) in an action against R. for the purpose of proving that R. was in possession of the same goods, on the day after they were first taken.

APPEAL from Baltimore County Court. This was an action of replevin brought on the 16th of July, 1823, by the now appellant, against the appellee, for certain goods and chattels, and negro slaves. The defendant (the appellee) pleaded *non cepit*, and property in himself. Issue was joined to the first plea, and general replication and issue to the second plea.

1. At the trial the plaintiff gave in evidence that William Wyse, the plaintiff's testator, departed this life at his residence in Baltimore County, about the year 1814, leaving * the following last will and testament: "Baltimore, 12th March, 1814—Having at this perilous moment of my life committed myself to the care of Almighty God, whom I trust will receive my soul, I have only to request my affectionate wife and son John, in case of a deficiency of my estate, to support and educate my children; that my real estate, known by name of the Deer Park, be disposed of for the maintenance of said children, under the direction of my wife, Rachel, and John Wyse." 87

The will was proved on the 12th of April, 1814, by two of the subscribing witnesses, &c. That after his death, letters of administration, with the will annexed, were duly granted to Rachel Wyse, the widow of the said testator, who took upon herself the execution of said trust. That the said Rachel Wyse, as administratrix aforesaid,

(a) Cited in *Clagett vs. Salmon*, 5 G. & J. 844; *Mitchell vs. Mitchell*, 1 Gill, 88; *Ridenour vs. Keller*, 2 Gill, 145; *Williamson vs. Morton*, 2 Md. Ch. 101; *Lark vs. Linstead*, *Ibid*, 168; S. C. 2 Md. 427, 428. See Rev. Code, Art. 50, sec. 198, 204.

returned to the Orphans' Court of Baltimore County the following inventory and account. The inventory was dated the 8th of July, 1814, and proved by the administratrix on the 23d of July, 1814, amounting to \$6,735.25. The first account was settled by the administratrix with the Orphans' Court on the 29th of June, 1816, in which she charged herself with the amount of the inventory, \$6,735.25. Also for cash received from sundry persons, \$270, being a total of \$7,005.25. She craved allowance for sundry payments and disbursements, \$1,292.91, leaving a balance due the estate of \$5,712.34. And died about the month of April, 1823, having returned no other account than that above stated, of her administration aforesaid. The plaintiff further gave in evidence, that at the death of the said William Wyse, he was entitled to, and in possession of, the property in dispute in this cause, and that the same continued in the possession of the said Rachel Wyse until her death. He further gave in evidence, that after the death of the said Rachel Wyse, letters of administration *de bonis non*, on the estate of the said William Wyse, were duly granted to the plaintiff in this cause; and that the plaintiff, as such administrator, returned to the Orphans' Court of Baltimore

County the following inventory: * The inventory, made 88 by certain appraisers in the usual form, was dated the 23d of January, 1824, amounting to \$2,293, and proved by the plaintiff, as administrator aforesaid, on the 3d of February, 1824. On the back of the inventory is thus written: "All the goods and chattels described in the within inventory, are claimed by George Riston, and actions are now depending in Baltimore County Court for the purpose of trying the right of the said George Riston, and also the right of the administrator, to the said goods and chattels." Signed by the administrator *de bonis non*, &c. The plaintiff further gave in evidence, that no other proceedings in relation to the said estate of the said William Wyse, deceased, except those above stated, have been had in the Orphans' Court. He also gave in evidence, that the said William Wyse left a widow, the above named Rachel Wyse, and eight children, namely, John M., William A., (a) Margaret, Nicholas, Edward, Matilda, and Octavius, all of whom, except the three first, are minors, and yet living. He further gave in evidence, that the property in controversy in this case, was replevied out of the possession of the present defendant, and that such property is the same as that mentioned in the foregoing inventories.

The defendant then offered in evidence the following instrument of writing, under the attestation and certificate of the clerk of Baltimore County Court thereupon endorsed. This was a deed of mortgage, dated the 16th of May, 1822, between Rachel Wyse, widow of William Wyse, deceased, John M. Wyse, William A. Wise and Eliza

(a) The name of Eliza is omitted, probably by mistake.

Wyse, stating that the grantors were indebted to the grantee in the sum of \$2,000 upon a promissory note then drawn by the said John M. Wyse, in favor of the said Rachel, or order, and by her and the said William A. and Eliza endorsed, payable 12 months after date; and for the purpose of securing the payment of the said sum of money at the time limited by the said promissory note for the payment thereof, the * grantors agreed to execute these presents—whereby was granted, &c. to the said grantee, “his heirs, executors, administrators and assigns, all the right and estate whatsoever, both in law and equity, of the said Rachel Wyse, John M. Wyse, William A. Wyse and Eliza Wyse, and each of them, as well of, in, to and out of, all that lot of ground number 49, situate and lying on Fell’s Point in the City of Baltimore,” &c. “as in all and singular other the real and personal estate of every description, whereof the said William Wyse died seized or possessed, or to which he was in any manner entitled at the time of his death, wherever the same may be. To have and to hold all and singular the real said and personal estate, property and premises,” &c. “unto the said George Riston, his heirs, executors, administrators and assigns,” &c. The defendant also offered in evidence, that Rachel Wyse, the administratrix of William Wyse, deceased, and one of the said mortgagors, were at the time of the execution and delivery of the said instrument of writing to the defendant, in the actual possession of the property therein mentioned, and that the personal property is the same property mentioned in the declaration in this cause. That the said Rachel Wyse, upon the death of her husband, had taken possession of the said property as administratrix; and that she and the other mortgagors had lived upon the farm from the time of the death aforesaid, and used the said personal property as their own, until the time of the execution of the said instrument of writing, and afterwards. That they had no other personal property. The defendant then prayed the opinion of the Court, and its direction to the jury, that by the said instrument of writing, such an interest in and to the property therein mentioned, passed to the defendant, as prevents the plaintiff, as administrator *de bonis non* of William Wyse, from maintaining the present action, and that he is not entitled to recover. Of which opinion the Court [HANSON, A. J.] was, and instructed the jury as prayed by the defendant. The plaintiff excepted.

2. The plaintiff then asked the opinion of the Court, and * their direction to the jury, upon all the evidence stated in the plaintiff’s next preceding bill of exceptions. 1st. That the said deed of mortgage, so given in evidence by the defendant in such prior bill of exceptions, operated to pass no more of the personal estate of William Wyse, deceased, than the interest and share to which the parties, mortgagors to such mortgage, were respectively entitled, as the widow and distributees of William Wyse, deceased, after the payment of the debts of the said deceased. 2d. That the

returned to the Orphans' Court of Baltimore County the following inventory and account. The inventory was dated the 8th of July, 1814, and proved by the administratrix on the 23d of July, 1814, amounting to \$6,735.25. The first account was settled by the administratrix with the Orphans' Court on the 29th of June, 1816, in which she charged herself with the amount of the inventory, \$6,735.25. Also for cash received from sundry persons, \$270, being a total of \$7,005.25. She craved allowance for sundry payments and disbursements, \$1,292.91, leaving a balance due the estate of \$5,712.34. And died about the month of April, 1823, having returned no other account than that above stated, of her administration aforesaid. The plaintiff further gave in evidence, that at the death of the said William Wyse, he was entitled to, and in possession of, the property in dispute in this cause, and that the same continued in the possession of the said Rachel Wyse until her death. He further gave in evidence, that after the death of the said Rachel Wyse, letters of administration *de bonis non*, on the estate of the said William Wyse, were duly granted to the plaintiff in this cause; and that the plaintiff, as such administrator, returned to the Orphans' Court of Baltimore

County the following inventory: * The inventory, made
 88 by certain appraisers in the usual form, was dated the 23d of January, 1824, amounting to \$2,293, and proved by the plaintiff, as administrator aforesaid, on the 3d of February, 1824. On the back of the inventory is thus written: "All the goods and chattels described in the within inventory, are claimed by George Riston, and actions are now depending in Baltimore County Court for the purpose of trying the right of the said George Riston, and also the right of the administrator, to the said goods and chattels." Signed by the administrator *de bonis non*, &c. The plaintiff further gave in evidence, that no other proceedings in relation to the said estate of the said William Wyse, deceased, except those above stated, have been had in the Orphans' Court. He also gave in evidence, that the said William Wyse left a widow, the above named Rachel Wyse, and eight children, namely, John M., William A., (a) Margaret, Nicholas, Edward, Matilda, and Octavius, all of whom, except the three first, are minors, and yet living. He further gave in evidence, that the property in controversy in this case, was replevied out of the possession of the present defendant, and that such property is the same as that mentioned in the foregoing inventories.

The defendant then offered in evidence the following instrument of writing, under the attestation and certificate of the clerk of Baltimore County Court thereupon endorsed. This was a deed of mortgage, dated the 16th of May, 1822, between Rachel Wyse, widow of William Wyse, deceased, John M. Wyse, William A. Wise and Eliza

(a) The name of Eliza is omitted, probably by mistake.

Wyse, stating that the grantors were indebted to the grantee in the sum of \$2,000 upon a promissory note then drawn by the said John M. Wyse, in favor of the said Rachel, or order, and by her and the said William A. and Eliza endorsed, payable 12 months after date; and for the purpose of securing the payment of the said sum of money at the time limited by the said promissory note for the payment thereof, the * grantors agreed to execute these presents—whereby was granted, &c. to the said grantee, “his heirs, executors, administrators and assigns, all the right and estate whatsoever, both in law and equity, of the said Rachel Wyse, John M. Wyse, William A. Wyse and Eliza Wyse, and each of them, as well of, in, to and out of, all that lot of ground number 49, situate and lying on Fell’s Point in the City of Baltimore,” &c. “as in all and singular other the real and personal estate of every description, whereof the said William Wyse died seized or possessed, or to which he was in any manner entitled at the time of his death, wherever the same may be. To have and to hold all and singular the real said and personal estate, property and premises,” &c. “unto the said George Biston, his heirs, executors, administrators and assigns,” &c. The defendant also offered in evidence, that Rachel Wyse, the administratrix of William Wyse, deceased, and one of the said mortgagors, were at the time of the execution and delivery of the said instrument of writing to the defendant, in the actual possession of the property therein mentioned, and that the personal property is the same property mentioned in the declaration in this cause. That the said Rachel Wyse, upon the death of her husband, had taken possession of the said property as administratrix; and that she and the other mortgagors had lived upon the farm from the time of the death aforesaid, and used the said personal property as their own, until the time of the execution of the said instrument of writing, and afterwards. That they had no other personal property. The defendant then prayed the opinion of the Court, and its direction to the jury, that by the said instrument of writing, such an interest in and to the property therein mentioned, passed to the defendant, as prevents the plaintiff, as administrator *de bonis non* of William Wyse, from maintaining the present action, and that he is not entitled to recover. Of which opinion the Court [HANSON, A. J.] was, and instructed the jury as prayed by the defendant. The plaintiff excepted.

2. The plaintiff then asked the opinion of the Court, and * their direction to the jury, upon all the evidence stated in the plaintiff’s next preceding bill of exceptions. 1st. That the said deed of mortgage, so given in evidence by the defendant in such prior bill of exceptions, operated to pass no more of the personal estate of William Wyse, deceased, than the interest and share to which the parties, mortgagors to such mortgage, were respectively entitled, as the widow and distributees of William Wyse, deceased, after the payment of the debts of the said deceased. 2d. That the

jury the defendant objected as incompetent evidence. 1st. Because the said paper is a part of the proceedings in another cause, and that it is not competent for the plaintiff to offer such evidence without producing the whole of the proceedings in the said cause. 2d. Because the said proceedings are in a cause between other and different parties. 3d. Because the said evidence is not relative to the issue on the part of the plaintiff in this cause. But the Court overruled the objection, and permitted the said paper to be read to the jury. The defendant excepted. Verdict and judgment for the defendant, and the plaintiff appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

J. Scott, for the appellant, contended: 1. That the property mentioned in the proceedings in this cause, passed to and vested in Joseph Allender, the appellant, as administrator *de bonis non* of William Wyse. 2. That the deed of mortgage, given in evidence by the defendant, operated to pass no more of the personal estate of the said William Wyse, deceased, than the interest or share to which the parties, mortgagors, were respectively entitled, as the widow and distributees of the said testator, after the payment of his debts. 3. That the said deed conveyed no interest in said estate, to which Rachel Wyse was entitled, as administratrix of the said William Wyse. 4. That the said Rachel Wyse had no legal authority, as administratrix, to execute the said deed, and transfer any interest which she held as administratrix in the said personal estate.

5. That as she does not describe herself as administratrix,
94 * the true construction of the said deed is, that she did not intend by the same to transfer her interest in the same as administratrix. 6. That inasmuch as the consideration stated in the deed is to secure a debt due by the said Rachel Wyse, in her individual character, as the endorser of the note mentioned in the said deed, that the same was not such a fair and *bona fide* consideration as would render the same deed legal and valid, to pass any other interest in the personal estate of the said testator, than the interest which the said Rachel Wyse and the other mortgagors had in the said personal estate as the distributees thereof. 7. That the inventory returned by the plaintiff to the Orphans' Court was competent evidence to go to the jury for the purposes for which it was offered. He referred to *Haslett vs. Glenn*, 7 H. & J. 17; *Hill vs. Simpson*, 7 Ves. 168.

Glenn, for the appellee, submitted on notes.

* An executor or administrator can sell or convey all the
95 personal property of the deceased whenever and wherever he pleases; and although it be a *devastavit* in him, yet this does not affect the sale. He may even give the property away. See *Went. Off. of Executors*, 295, 297; 1 *At. Reports*, 463; *St. Andrew's Church vs.*

paper, so offered in evidence, was competent and legal proof to show the fact that such an inventory was made and given by the plaintiff in the Orphans' Court; but not to prove that the property therein mentioned belonging to the plaintiff or his intestate; and refused to let the said inventory be read in evidence for the purpose for which it was offered by the plaintiff. The plaintiff excepted.

4. The plaintiff, to prove the property or some part thereof, in the declaration mentioned, to have been in the possession of the defendant at the time of the replevin, offered in evidence by P. Codd, a competent witness, that the property in the declaration mentioned was on the farm *occupied by William Wyse in his life-time, and John M. Wyse, his son, at the time of the service of the writ of replevin in this case. That the same property had not been taken possession of, or removed by the defendant, except a small portion of the furniture which had been put in the defendant's wagon; but when so put in the wagon, the defendant was not on the premises. And the witness states that he does not remember whether the schedule and receipt, hereinafter referred to, were signed by the defendant on the farm or in the City of Baltimore; but when the witness went on the premises, Mr. Fishach, the agent of the defendant, was there, and loading the wagons by the defendant's direction. The negroes were not in the wagon. The witness saw no opposition at the time made by any person to the defendant's taking the property. The witness stated that he did not recollect anything of the property, more than he finds mentioned in the schedule in his hand-writing. He saw the property on the place, and in the hands of John M. Wyse. Upon explaining this part of his testimony, the witness states that he did not mean thereby to say the property not in the wagon was in the actual possession of John M. Wyse, or that any part of it was so; that he did not know the property to have been William Wyse's. The plaintiff then offered in evidence the following paper: "A schedule of the goods and chattels of John M. Wyse, Eliza Wyse and William A. Wyse, seized and taken at the suit of George Riston, by virtue of a writ of replevin issued out of Baltimore County Court, and to the sheriff thereof directed, and appraised by us, the subscribers, after being duly summoned and sworn for that purpose. Given under our hands and seals, this — day of July, 1823. One negro girl named Nan, aged 15, \$230," &c. The whole amounting to \$1,905.37½, and signed by the appraisers. Also a receipt dated the 15th of July, 1823, signed by Riston, stating that he had received from the sheriff of Baltimore County "the foregoing list of goods, as per schedule." Which paper, it was admitted, was one *of the papers of record in this Court in the cause in which George Riston was plaintiff, and John M. Wyse, Eliza Wyse and William A. Wyse, were defendants, and was the schedule prepared and returned in that cause by the sheriff of Baltimore County. To the reading of which paper to the

jury the defendant objected as incompetent evidence. 1st. Because the said paper is a part of the proceedings in another cause, and that it is not competent for the plaintiff to offer such evidence without producing the whole of the proceedings in the said cause. 2d. Because the said proceedings are in a cause between other and different parties. 3d. Because the said evidence is not relative to the issue on the part of the plaintiff in this cause. But the Court overruled the objection, and permitted the said paper to be read to the jury. The defendant excepted. Verdict and judgment for the defendant, and the plaintiff appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

J. Scott, for the appellant, contended: 1. That the property mentioned in the proceedings in this cause, passed to and vested in Joseph Allender, the appellant, as administrator *de bonis non* of William Wyse. 2. That the deed of mortgage, given in evidence by the defendant, operated to pass no more of the personal estate of the said William Wyse, deceased, than the interest or share to which the parties, mortgagors, were respectively entitled, as the widow and distributees of the said testator, after the payment of his debts. 3. That the said deed conveyed no interest in said estate, to which Rachel Wyse was entitled, as administratrix of the said William Wyse. 4. That the said Rachel Wyse had no legal authority, as administratrix, to execute the said deed, and transfer any interest which she held as administratrix in the said personal estate.

5. That as she does not describe herself as administratrix,
94 * the true construction of the said deed is, that she did not intend by the same to transfer her interest in the same as administratrix. 6. That inasmuch as the consideration stated in the deed is to secure a debt due by the said Rachel Wyse, in her individual character, as the endorser of the note mentioned in the said deed, that the same was not such a fair and *bona fide* consideration as would render the same deed legal and valid, to pass any other interest in the personal estate of the said testator, than the interest which the said Rachel Wyse and the other mortgagors had in the said personal estate as the distributees thereof. 7. That the inventory returned by the plaintiff to the Orphans' Court was competent evidence to go to the jury for the purposes for which it was offered. He referred to *Haslett vs. Glenn*, 7 H. & J. 17; *Hill vs. Simpson*, 7 Ves. 168.

Glenn, for the appellee, submitted on notes.

* An executor or administrator can sell or convey all the
95 personal property of the deceased whenever and wherever he pleases; and although it be a *devastavit* in him, yet this does not affect the sale. He may even give the property away. See *Went. Off. of Executors*, 295, 297; 1 *At. Reports*, 463; *St. Andrew's Church vs.*

Tompkins, 7 *Johns. Ch. Reports*, 16; *Noy*, 106; *Cro. Jac.* 318; *Coventry's Powell on Mortgages*, 101; *Toller*, 134. Lord Hardwicke says, in 1 *Atk.* 463: at law the executor has the power to alien or dispose of the assets of the testator, and no creditor at law can follow them. And Chancellor Kent, in 7 *Johns. Ch. Rep.* 16, states distinctly that an executor has the right to transfer the assets of the deceased, to indemnify one of his own securities, not for him as administrator, but in a different right.

In some cases in Chancery the assets may be followed in the hands of the vendee, but they are extremely rare, and they all proceed upon the ground of implied trusts, with which this Court, as a Court of law, has nothing to do. And this is the case in 7 *Vesey*, and which of course has no application to this case.

The case in 7 *H. & J.* 17, only decides that an executor does not, by paying the debts of the testator, become entitled to the property of the deceased. It does not at all profess to determine that an executor cannot convey, by deed or otherwise, the assets of a testator; but this case leaves the law, as to the executor's power to sell, just where it found it. Suppose, however, I should be wrong on this point, still, as it appears, that when this conveyance was executed, that testator had been dead eight * years, and administration 96 been granted for the same length of time, and it nowhere appears that there is a single outstanding debt; it follows that the widow was actually the owner of one-third of all the personal chattels, and the other grantors, Eliza, William and John, entitled to three-eighths of the residue. By Mrs. Wyse's account, it appears that on the payment of the debts, there was yet property to the amount of \$5,712.34; one-third of this is \$1,904.11; three-eighths of \$3,808.23 is \$1,428.09, making a total of \$3,332.20. Now it appears that the whole personal property in Riston's hands only amounted to \$2,293, more than \$1,000 less than the grantors were entitled to. Will this Court then deprive the vendee of property thus conveyed, evidently less in value than it manifestly appears they were entitled to from the estate of the deceased? Taking, then, Mrs. Wyse as administratrix of the deceased, or considering her and her three children as distributees, entitled to a portion of the estate, they were clearly entitled to convey the property in question to Riston; and if the children or creditors of William Wyse, deceased, have any right to this property, it can only be in equity, where they can resort for redress.

STEPHEN, J. delivered the opinion of the Court. In this case the plaintiff, as administrator *de bonis non* of William Wyse, instituted an action of replevin against the defendant, to recover certain property, out of his possession, which he claimed in his representative character, as part of the assets of said Wyse. In 1814, William Wyse died intestate as to his personal estate; letters of administra-

tion were granted to his widow, who returned an inventory, and settled an account with the Orphans' Court of Baltimore County, in which she craved an allowance for sundry payments and disbursements, amounting to the sum of \$1,292.91. This account was settled on the 29th of June, 1816. The deed of mortgage under which the

97 defendant claims * title to the property, was dated on the 16th of May, 1822, executed by the widow and administratrix, and three of the representatives. Nearly six years had elapsed between the account settled with the Orphans' Court, and the execution of the deed of mortgage. The question principally argued in this case, was, as to the power of an executor or administrator, to dispose of the assets of his testator or intestate, in satisfaction of his own debts. The mortgage was given as collateral security, for the payment of a note of hand drawn and endorsed by the mortgagors, payable to the defendant. According to the authorities, it seems that at law, an executor or administrator may transfer the assets of the deceased, in satisfaction of his own debts. *Toller on Executors*, 256, 257, says, he has power to sell, or as it has been held, to mortgage terms of years, or assign mortgaged terms, and to dispose of any of the effects; although as it seems specifically given by the will, and even in satisfaction of his own private debt. Nor when he has aliened the assets, can a creditor follow them at law; for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien on the assets. Equity will, indeed, follow assets on voluntary alienations, by collusion with the executor; but if the alienation or pledge be for a valuable consideration, unless fraud be proved, neither law nor equity will defeat it: for a purchaser from an executor has no means of knowing the debts of the testator; and if a Court of equity, on the subsequent appearance of debts, would control such purchaser, all dealings with executors, would be dangerous; and even in equity, Chancellor Kent, in referring to the case of *Nugent vs. Gifford*, 1 *Atkins*, 463, in 7 *Johns. Chan. Rep.* 17, says an assignment of a mortgage term (and it was a mortgage to trustees, in trust for the testator) was made by the executor to the plaintiff, in satisfaction of a debt due from the executor to the plaintiff. Yet Lord Hardwicke held the assignment to be valid, and that

98 the creditors of the testator * were not entitled to follow the property. A purchaser from an executor has no power of knowing the debts of the testator; and if he did know it was testamentary assets, it would not affect the validity of the assignment, as it was an alienation for a valuable consideration; and no fraud or collusion with the executor to misapply the assets, appeared. The doctrine in that case has been repeatedly advanced; and it appears to be an established principle, both at law, and in equity, that a bare act of sale of the assets by the executor, is a sufficient indemnity to the purchaser, if there be no collusion. In the case of *Whale vs. Sir Ch. Booth*, Lord Mansfield observed, that if at the time of the alien-

ation, the purchaser knew they were assets, this was no evidence of fraud; for all the testator's debts may have been already satisfied: or, if he knew that the debts were not already satisfied, must he look to the application of the money? no one would buy on those terms. There is one exception, indeed, where a contrivance appears between a purchaser and an executor, to make a *devastavit*. In 7 *Johns. Chan. Rep.* 157, Chancellor Kent says, "subsequent decisions, have, in some degree, restrained the extent of the doctrine laid down by Lord Hardwicke, and Lord Mansfield. In *Bonney vs. Ridgard*, 1 *Cox*, 144, Lord Kenyon, the Master of the Rolls, admitted, that in general the purchaser from the executors of the testator's assets was not bound to see to the application of the money; but, that if upon the face of the assignment of the property, it appeared to have been made in satisfaction of a private debt of the executor, the sale was fraudulent against the persons interested, under the will, and equity would relieve. It would be a case of implied fraud." So again in *Scott vs. Tyler, Dickens*, 712, Lord Thurlow held, that where an executrix pledged bonds, specifically, as a security for her own debt, contracted after the testator's death, the pawnee must deliver up the bond, for the benefit of the specific legatees. He admitted, that in general the purchaser of the assets had no concern with the application of the price, and that the rule applied equally * to mortgages, bonds and leases. But if one concerted with the executor to obtain 99 the effects at a nominal price, or at a fraudulent under-value, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of executor, the purchaser or pawnee will be liable. In *Hill vs. Simpson*, 7 *Vesey, Jr.* 152, Sir William Grant made a similar decree. He said, the assets known to be such, ought not to be applied in any case, for the discharge of the executor's debt, unless the creditor taking the assets can be first satisfied of his right so to apply them. Lord Eldon has also declared, "that there could not be a stronger case of a *devastavit* than an executor aliening the property of the testator, to pay his own debts, the alienee knowing at the time that debts of the testator were due." In the case now before this Court, it nowhere appears that there were any debts remaining due and unpaid at the time of the mortgage; or if there were, that the defendant knew of them, and to use the language of Mr. Justice Ashhurst, to be found in 4 *Term Rep.* 645: "if the creditors will lie by and not assert their rights, it is reasonable for a third person to suppose that all the debts are satisfied." But in this case, it does not appear that the administratrix acted in her representative character at the time she executed the deed of mortgage: she does not, in terms, assume that character, and has associated herself in making the disposition of the property, with three of the children and representatives of her intestate; from this fact, connected with the strong circumstances existing in the case to induce a presumption that the debts were all satisfied, it is fair to

infer that she had made distribution of the remaining assets, and acted in her character of distributee. And upon this view of the case, it follows that the appellant, the administrator *de bonis non*, is not entitled to recover.

As to the question raised in the cause, relative to the admissibility of the plaintiff's own inventory to support his case, made after the institution of the action, we think the * same was not competent evidence, because he might become personally liable for the costs of suit.

Judgment affirmed.

SIEMER'S Adm'r vs. SIEMER AND WIFE.—December, 1829.

A testator, after reciting in his will (which was executed in Germany) his intention to depart in a few days for America, "for the purpose of seeking his fortune," devised as follows: "He declares his deliberate will to be, that in case he should die unmarried in a foreign country, the small Opeman Cottage, situate at D. should be retained as heritable property, by his near relation G. the eldest daughter of I., farmer, at D. whom he hereby constitutes his sole heiress. She and her father, however, shall be held to pay to the three daughters of W. and D." a certain sum, as a legacy. "To his guardian C. he devises the turf moor at, &c." After this the testator came to Baltimore, where he died unmarried, and without issue, leaving personal property. *Held* that upon the true construction of this will, G. was entitled to the whole of the testator's personal estate; as it was his intention by the words "sole heiress," to give her every thing he had, except the property specifically devised, in the event of his dying unmarried in a foreign country.

APPEAL from the Orphans' Court of Baltimore County. A petition was filed by the appellees, Henry Siemer and Gesche, his wife, in the Orphans' Court of Baltimore County, on the 3rd of April, 1827, setting forth, that a certain John Siemer, late of Baltimore County, deceased, a native of Germany, did, when he was about leaving his country for the United States of America, execute a will, in the German language, which, by the order of that Court, was accepted as the last will and testament of the said Siemer, and admitted to be recorded as such in the Register of Wills' office, of said county; a copy of which, (as translated,) the petitioners exhibit as part of their petition. They * state that Charles F. Mayer, (the appellant)

101 had taken out letters of administration on the estate of the said John Siemer, who resided and died in the City of Baltimore, having never returned after leaving Germany as aforesaid, to that country. That said letters of administration, were granted without any knowledge of an existing will: that the administrator had proceeded to execute his trust, and after due notice, all the creditors of the estate had been paid. That several years have elapsed since the granting of administration, and that on the 2nd of April, 1827, the

said administrator had passed his third account, showing a balance in his hands of about \$1,278.42. That after said will was received, and ordered to be recorded, letters of administration, with the will annexed, were issued to said Mayer—they allege that Gesche, one of the petitioners, is the Gesche Warneken, in said will named, she having married the other petitioner, Henry Siemer, and they claim, that by virtue of said will, the petitioner, Gesche, is the only legatee of said deceased, and as such, entitled to the whole of the residuum of his estate, the time for the payment of which they say has arrived. Prayer, that the defendant may be summoned to answer, pass a final account, and that the balance in his hands may be paid over, and delivered to the petitioners, &c.

The will of John Siemer referred to in the preceding petition, is dated on the 28th of April, 1801. The testator, after declaring it to be his intention then to make his judicial testament, having (as he says) at that time, in view to depart for America in a few days, for the purpose of seeking his fortune. “He declares his deliberate will to be, that in case he should die unmarried in a foreign country, the small Opeman Cottage, situate at Drewe, should be retained as heritable property, by his near relation Gesche Warneken, the eldest daughter of Johann Warneken, farmer at Drewe, whom he hereby deliberately constitutes his sole heiress; she and her father, however, shall be held to pay to the three daughters of the toll collector, Wicken Warneken, * at Drewe, to wit, Margaret, Antrine, and Gesche, five hundred rix dollars in gold. As a legacy to his guardian Christopher Eggers, he devises the turf moor, &c.” 102

The answer of the defendant, admits the granting to him of letters of administration, on the estate of said Siemer, as alleged, and that he proceeded in the execution of his trust in the manner stated, and that letters of administration, with the will of the said Siemer annexed, were subsequently granted him as the petitioners allege—the respondent further admits, that the paper referred to and exhibited by the petitioners, was received by the Orphans’ Court of Baltimore County, as the last will and testament of the said John Siemer, and the said Siemer pronounced the same as his will, before he left his native country, Germany, as stated by the petitioners, and that said Siemer, after so making his will, and leaving Germany, never returned, and that he died in the City of Baltimore, where he had resided from the time of his arrival in the United States, unmarried, and without issue. The respondent further admits, that the Gesche Warneken, named in said will, and the Gesche Siemer, the petitioner, are one and the same person, and that she is the wife of the petitioner, Henry Siemer; but he denies that by virtue of said will, and the terms of any bequest or disposition therein, the said Gesche Siemer is entitled to have the funds or property of the deceased, John Siemer, exclusively to herself, as universal legatee, and without any participation of the next of kin of the said Siemer of equal

degree with her; and he insists, that the residue of the personal estate of the said Siemer, in his hands remaining, (all the debts being admitted to be paid) ought to be distributed in equal shares among the four cousins of the said deceased, who are his next of kin (named in the answer,) and of whom the petitioner, Gesche, is one. He further says, that he has rendered to the said Court, a final account of his administration, with the will annexed, by which, a balance is shown to be in his hands of \$1,268.16. It was admitted that the persons mentioned in * the answer as to the next of kin of the said John Siemer, in equal degree with the petitioner, are so the next of kin in equal degree.

A commission was sent to Germany to take proof, but as the opinion of the Court of Appeals turned entirely upon the construction of the will of Siemer, it is not necessary to set-out the proof taken and returned under it.

The Orphans' Court, on the 21st of May, 1827, decreed that the defendant, Charles F. Mayer, administrator as aforesaid of John Siemer, deceased, pay over to the petitioners in this cause, the balance remaining in his hands due the estate of said deceased, as appears by his last account rendered to this Court.

From this decree, the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Mayer, for the appellant, insisted, 1. That under the proper construction of the will, Gesche Siemer is entitled only to the property (the Cottage,) there specifically devised. 2. That even if the terms of the will, purported to give her the personal estate in question, yet that the will not being executed, agreeably to our laws, cannot be considered effectual for that purpose; the personal estate being here, and this having been the country of the deceased Siemer's residence at his death. Upon the first point he referred to 4 *Bac. Ab.* 254, 258; *Pratt vs. Flamer*, 5 *H. & J.* 10; *Dallam vs. Dallam*, 7 *H. & J.* 222; 4 *Bac. Ab.* 323; *Halloway vs. Halloway*, 5 *Ves.* 399; 4 *Bac. Ab.* 350. On the 2d point, *Desebats vs. Berquier*, 1 *Binney*, 336; *Sill vs. Worswick*, 1 *H. Blk.* 690; *De Sobry vs. De Laistre*, 2 *H. & J.* 191, 200; *Harvey vs. Richards*, 1 *Mason*, 403, 412; *Dixon vs. Ramsay*, 3 *Cranch*, 319; *Marsh vs. Hutchinson*, * 2 *Bos. and Pull.* 226; *Amb.* 25; *Ib.* 415; 104 *Holmes vs. Remsen*, 4 *Johns. Ch.* 478. Act of 1810, ch. 34

Frick, for the appellee, cited 2 *Black. Com.* 501; 2 *Com. Rep.* 452, 453, 454; *Tilghman vs. Stuart*, 4 *H. & J.* 166, 173; *Matthews vs. Warner*, 4 *Ves.* 197, 201; *Beauchamp vs. Earl of Hardwicke*, 5 *Ves.* 285; 4 *Bac. Ab.* 242, 339, 337; *Attorney-General vs. Butler*, 5 *Ves.* 339; *Hays on Adm'rs*, 217; *Doe vs. Lyde*, 1 *Term Rep.* 597; *Guier vs. O' Daniel*, (note,) 1 *Binney*, 351; *Baptiste vs. De Volunbrun*, 5 *H. & J.* 86; *Somerville vs. Lord Somerville*, 5 *Ves.* 787.

BUCHANAN, C. J. delivered the opinion of the Court. The only question in this case arises upon the construction of the will of John Siemer, deceased, admitted to probate and recorded in the Orphans' Court of Baltimore County.

And that question is, whether by the terms of the will, Gesche Warneken, the person therein named, now Gesche Siemer, on the death of the testator in this State, unmarried and without issue, (which is admitted,) became entitled * as residuary legatee, to the whole of his personal property left by him in this State, **105** at his death, after the payment of his debts, and the charges and expenses incident to the administration. The testator, after reciting in his will, (which was executed in Germany,) his intention to depart in a few days for America, for the purpose of seeking his fortune, devises, in the event of his dying unmarried in a foreign country, a small cottage by name, to Gesche Warneken, whom he constitutes in terms "his sole heiress;" and after directing the payment by her and her father, of a sum of money bequeathed as a legacy to others named in the will, devises the turf moor belonging to his place, to Christopher Eggers.

The will having been admitted to probate and record, without appeal, and there being no question presented by the record in this case upon that subject, the only inquiry to which our attention is called, is, what was the intention of the testator, in the use of the terms "sole heiress;" and whether the terms used, are such, as to be sufficient to effectuate that intention, that being the only matter involved in the decision appealed from. Thus restricted, the whole case lies within a very narrow compass.

There is nothing to show, that the testator owned any property any where, other than that disposed of in his will, at the time of making it; and looking to the circumstances under which the will was made, would lead to the conclusion, that he had no other, and made his will, with a view of guarding against casualties, and of securing all he had, to those for whom he felt the most lively interest, and from whom he was soon to part.

The will informs us, that in a few days he was about to leave his "native country," for a foreign and a distant land, for the purpose of seeking his fortune; and when, at such a juncture, he deemed it necessary to make a will at all, it is not to be presumed that he would have left behind him any of his property undisposed of; and if he did make an eventual disposition of all he had at that time, (and there is * nothing appearing to the contrary,) the provision in his will, constituting Gesche Warneken his "sole heiress," **106** was perfectly nugatory, unless he had an eye to future acquisitions, which he intended for her benefit, "in case he should (in the language of the will) die unmarried in a foreign country;" and the introduction of that condition in his will, of his dying unmarried in a foreign country, shows that he looked to acquisitions in a foreign

country, which he intended should go to her, in the event of his dying abroad and unmarried; if, by his will, he did dispose of all the property he had at that time in Germany, otherwise, in no event, could there have any thing for the provision constituting her his "sole heiress," to operate upon. Nothing in Germany, all he had there, being already disposed of; and if he married, or returned to Germany, and did not die in a foreign country, she was to take nothing under the will. Yet he certainly did intend, that provision should operate upon something, in the event of his dying abroad and unmarried; and the will, reciting that he was about to depart for America, for the purpose of seeking his fortune, instructs us, that he calculated on acquiring property here. But it is not material, in the construction of the will, whether the testator had, or had not any other property at the time, than that mentioned in it. He could not have intended to apply the provision constituting Gesche Warneken "his sole heiress," to that which had before been given to her, nor to that which was given to another; but must have intended it to operate upon what was not otherwise disposed of. The occasion of making his will, and the very terms of it sufficiently show, that he meant to dispose of the whole of his property of whatsoever kind it might be, and did not intend to die intestate of any part of it, whether in Germany, or acquired in a foreign country, for which he was about to depart to seek his fortune; and there is nothing to raise the slightest supposition, that he had not acquisitions made abroad, equally in contemplation with any property in Germany. He was going from his country and * his friends, and made his will,

107 with a view of providing for the contingency of his dying among strangers, which shows that he meant to leave nothing undisposed of; and that with the emphatic terms used, "sole heiress," evinces the intention, that Gesche Warneken, who seems to have been the peculiar object of his bounty, should take whatsoever he might leave, and not otherwise disposed of by his will, in the specified event of his dying unmarried in a foreign country; and we think the terms used, by which the intention is manifested, are sufficient to effectuate that intention, and to entitle Gesche Warneken to the whole of the personal property left at his death in this State, after the payment of his debts, and other proper charges. Not indeed as heiress, for taking under the will, she could not, if it was real property to be affected by it, take in that capacity, but by purchase, as a legatee. The constituting her "sole heiress," being in effect, to give her every thing he had; and in relation to the personal property, equivalent to a bequest of all he possessed. It is an expression of his will, that she should have the whole of his estate in the event specified, in any capacity in which she could take it, either as devisee or legatee: as much so, as if he had said my will is, Gesche Warneken shall take, (or have) the whole of my estate, in case I should die unmarried in a foreign country, which would clearly carry

the property in controversy, there being no set form of words necessary; and it is enough if the words used sufficiently manifested the meaning and will of the testator.

Decree affirmed.

* KEMP vs. THE BALTIMORE FIRE INSURANCE COMPANY. 108
June, 1830.

An Insurance Company having elected to rebuild a mill destroyed by fire, which they were bound to complete within a reasonable time, contracted with S. on the 15th October, 1824, who agreed to rebuild and complete it on or before the 1st June next thereafter, for which he was to be paid "\$800 in hand, and \$1,000 on the 1st December next, continuing as the work progressed, the payment of \$1,000 on the first day of each following month, until the 1st July inclusive, provided the work shall then be finished." On the 16th December, 1824, S. drew an order on the company in favor of the millwright, which authorized the company to retain \$750 out of the last payment to be made to him, and to pay it over to the millwright, as soon "as he is completely finished, agreeably to his contract." This order was accepted by the company. In an action by the millwright upon the order, it appeared that he had finished his part of the work according to his contract with S.—that the owners of the mill were satisfied with the character of his work—that the mill, however, was not finished until January, 1826—that the company retained the last \$1,000, which they were to pay S. to answer a suit which the proprietors of the mill had brought against them, for an alleged violation of S's contract. *Held*, that upon the true construction of the order, the plaintiff was entitled to receive the \$750 from the company, only in the event of S. becoming entitled to his last instalment, out of which it was to be paid—and that although time is not generally considered to enter into the essence of a contract; yet, in this case, it ought to have that effect, by reason of the company's liability to the assured to rebuild in a reasonable time. (a)

In an action against a corporation, the affidavit of the president thereof made for the purpose of procuring a continuance, in another cause than that in which it was offered as evidence, is not competent testimony against such corporation, though the subject-matter of the affidavit be pertinent to the issue. He should be sworn as a witness, the defendant being entitled to a cross examination.

APPEAL from Baltimore County Court. Assumpsit by the appellant, against the appellees, on an accepted order, drawn by a certain David Scott, on the appellees, and dated December 16th, 1824. The declaration contained a special count on the order, the money counts, a count for work and labor, and on an *insimul computassent*. The defendants pleaded *non assumpsit*, and issue was joined.

* 1. At the trial, the plaintiff offered in evidence to the jury the following order of David Scott upon the said company, 109

(a) Cf. *Gill vs. Weller*, 52 Md. 8.

and also the acceptance of the same by David Williamson, who was at the time, and still is, the president of the said company. "Frederick County, December 16th, 1824. Sir, Agreeable to an article entered into this day, by Daniel Kemp, to do the millwright's work of Walter B. Kemp's mill on the Monocacy, I do hereby authorize you to retain seven hundred and fifty dollars out of the last payment to be made to me, and to pay it over to said Kemp as soon as he is completely finished, agreeable to this contract, and charge the same to account of your humble servant, David Scott. To David Williamson, Esq. President of the Baltimore Fire Insurance Company. Accepted. D. Williamson, Prest. 23d December, 1824." The plaintiff further offered in evidence, the policy of insurance between the defendants and the owners of the said mill, by which the same was insured against loss from fire, and which secured to the defendants, the right of reinstatement, in preference to payment, if the former should be deemed most expedient by the company. And also offered in evidence, the following agreement: "Memorandum of an agreement made this 15th of October, 1824, by, and between the president and directors of the Baltimore Fire Insurance Company of the one part, and David Scott, of Frederick County, of the other part, witnesseth: That the said David, hath agreed to rebuild the Monocacy mill, and replace all the machinery which was in the said mill, agreeably to the description given by Mr. John Davies, in his letters of the 9th June, 1823, and 13th October, 1824, and a plot presented at the office of said company, this day; the said mill having been insured in this office, for Walter B. Kemp, and to complete the same on or before the first day of June next, for, and in consideration of the aforesaid, the Insurance Company promise to pay the said Scott eight hundred dollars in hand, and one thousand dollars on the first day of December next, continuing as the work progresses, the payment * of one thousand dollars, on the first day of each fol-

110 lowing month, until the first of July inclusive; provided, the work shall then be finished. D. Williamson, President. David Scott. The above to serve, until a more full detail and contract shall be executed, and security given by the said Scott." He also offered in evidence to the jury, the following letters: "To the President and Directors of the Baltimore Fire Insurance Company. Gentlemen: Mr. Buckey has left with me, for adjustment, a claim against your office, to a considerable amount, for a loss on a mill on the Monocacy. Will you be so good as to inform me if it can be adjusted otherwise than by suit. Very respectfully, John Glenn. Baltimore, February 25th, 1826." "Mr. John Glenn, Sir: We have received your note as attorney for Mr. Buckey, wherein you state he has a claim on this office. He was in town about two weeks since, and did not exhibit any account of what he claimed from the company. They have fulfilled their engagement, by rebuilding a new mill several thousand dollars better than the old one, which can be proved. By order,

Henry W. Webster, Sec'y. Baltimore, February 28th, 1826." And also proved by Webster, secretary of the defendants, that he was such, and that by a parol order of the board, he had addressed the said letter to John Glenn, Esquire. And that the mill mentioned in said letter, was the same referred to, in the order drawn by Scott upon the defendants. The plaintiff also proved that he had completed his portion of the work, according to the terms of his contract with Scott, and that Scott had received the said work, and expressed himself satisfied therewith. And that the defendants had paid Scott all the payments to which he was entitled under his contract, for rebuilding said mill, except the last payment, amounting to one thousand dollars, which sum remained with, and still is retained by the defendants, because of an alleged non-compliance, made by the persons entitled to the said policy of insurance, by David Scott, with his said contract with the company; and on account of which, a suit is now pending in this Court on *said policy, against the defendants. And that the mill was built by Scott, and in **111** a workmanlike and proper manner: that the same had been burnt down in August, 1824, but was not rebuilt and finished, until 1st January, 1826, on which day, the proprietors took possession thereof, and afterwards gave the following note, signed by Christian Kemp and Daniel Buckey: "15th January, 1826. George Baer, Esquire. You can state to David Williamson, Esquire, President of the Baltimore Fire Insurance Company, that we were called on by Daniel Kemp, millwright, who has done the millwright's work to the mills called Monocacy mills, which David Scott had undertaken to rebuild for the Baltimore Fire Insurance Company. We are satisfied with the workmanship of Daniel Kemp. We have taken the mill off his hands, as to the workmanship." After the foregoing evidence had been given to the jury, the plaintiff offered in evidence, legal proof of the pendency of a suit in Baltimore County Court, wherein Walter B. Kemp, (for the use of Christian Kemp and Daniel Buckey,) was plaintiff, and the said Baltimore Fire Insurance Company, defendants; and that on the 26th November, 1827, said defendants applied for the continuance of said suit, and for the purpose of procuring the same, the said Williamson, as president aforesaid, made in open Court the following affidavit: "*Kemp vs. The Baltimore Fire Insurance Company*. Baltimore County Court, September Term, 1827. David Williamson, president of the Baltimore Fire Insurance Company, the defendants in this cause, makes oath in open Court, that the defendants cannot proceed to the trial of the cause at this time, for the want of evidence material, competent, and proper; that William Durham and David Scott, are material, competent, and proper witnesses, for the defendants in the said case, and that the company expect to prove by said witnesses, that the mill in the policy of insurance mentioned, upon which the action is brought, was, after the

112 destruction * thereof, rebuilt by said company, under the provisions of the memorandum, at the foot of said policy, within a reasonable time, and was as good when rebuilt, as the mill burnt was originally when insured, &c;” which said affidavit, the plaintiff offered to read in evidence, (the said Williamson being then present in Court,) to the jury, in order to shew to the jury, that the mill had been rebuilt, and to use the said affidavit as an admission thereof. To the reading of which affidavit to the jury, as evidence of the fact, that the conditions stated in the accepted order of Scott, upon defendants, and upon which, as appears upon the face of said order, it was accepted as aforesaid, by said Williamson as president, had been complied with, the defendants objected, and the Court being of opinion, that the same was not evidence for the purpose aforesaid, rejected the same, the plaintiff excepted.

The defendants then upon the whole of the evidence above stated, as given to the jury, prayed the Court, to direct the jury, that the said evidence was not sufficient to prove, that the conditions upon which the aforesaid order had been given and accepted, had been complied with, and that the plaintiff was not entitled to recover; which direction, the Court gave. The plaintiff excepted, and the verdict and judgment being against him, he appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE and STEPHEN, JJ.

113 *Frick*, for the appellee, * cited *Morris vs. Brickley*, 1 H. & G. 107; *Davis vs. Davis*, 7 H. & J. 38, 39; *Elder vs. Warfield*, 1b. 394, 417; *Laidlow vs. Organ*, 2 Wheat. 178; *Cathell vs. Goodwin*, 1 H. & G. 470; *Wright vs. Freeman*, 5 H. & J. 478; *Ferguson vs. Tucker*, 2 H. & G. 189; *Burt vs. Gwinn*, 4 H. & J. 516; *Alston vs. Contee*, 1b. 351; 1 *Stark. Ev.* 398, 399; *Etting vs. Bank U. S.* 11 Wheat. 75; 1 *Stark. Ev.* 429; *McLanahan vs. Universal Ins. Co.* 1 *Peters' S. C. Rep.* 170, 171; *Thornton vs. Wynn*, 12 Wheat. 183.

Johnson, for the appellees, cited *Ferris vs. Walsh*, 5 H. & J. 306; *Bateman vs. City Bank*, 7 H. & J. 104.

STEPHEN, J. delivered the opinion of the Court. The facts of this case, and the questions therein involved, lie within a very narrow compass. They are as follows: (here the Judge stated the facts in the bills of exceptions,) and then said, the principal question in the case arises upon the true construction of Scott's order upon the com-

114 pany, in favor of Daniel Kemp. By the terms * of his contract with the company, Scott was bound to rebuild the mill by the first of June, 1825, and it was proved in the cause, that it was not rebuilt until the first of January, 1826. The mill was burnt down in August, 1824. The company having elected to rebuild the mill, were bound to do it in a reasonable time. Scott contracted on the 15th of October to rebuild it by the 1st of June, 1825, and his last

payment was to be made upon that condition; and although time is not generally considered to enter into the essence of a contract, yet in this case, we think it ought to have that effect, by reason of the company's liability to the assured, to rebuild in a reasonable time; and for the non-performance of which, it appears, that a suit had been commenced against them. We think, that upon the true construction of the order, Daniel Kemp was entitled to receive the \$750 from the company, only in the event of Scott's becoming entitled to receive his last instalment of \$1,000, out of which it was to be paid, upon complying with the terms of his contract, to rebuild the mill by the 1st of June, 1825. We are furthermore of opinion, that the affidavit of David Williamson, was properly rejected, as he was present in Court at the time, and ought to have been sworn as a witness, the defendants in the cause being entitled to a cross-examination.

Judgment affirmed.

JACOB SHILKNECHT *et al.* Lessee vs. EASTBURN'S Heirs.—June, 1830.

To give a deed a legal effect and operation, as a deed under a decree of the Court of Chancery, a copy of the record ought to be produced, to show the trust reposed in the grantor, and his legal performance of it.

Although a deed cannot have legal operation as a deed under a decree of Chancery, without producing the record, yet it shall be taken most * strongly against the grantor; and such legal interest as he had, capable of being transferred, may pass thereby. **115**

In 1752, a patent was granted for a tract of land called P. containing 50 acres. In 1754, another patent was granted for a tract called Resurvey of P. containing 875 acres. They were issued to the same grantee; and in 1791, his heirs conveyed a tract called P. containing 375 acres. to certain persons, their heirs and assigns in trust. In an action of ejectment for a tract of land called the Resurvey of P. the lessor of the plaintiffs claimed title from the surviving trustee, under a deed for a part of the last mentioned tract, which described the part conveyed by metes and bounds, and professed to be executed in pursuance of a decree in Chancery. No decree was produced, nor any evidence that the aforesaid tracts of land were the same, in fact, but called by different names. *Held*, That the deed of 1791 could only convey to its grantees, the trustees, the tract P. according to its original lines, metes, and bounds, and that they could transfer no title to land claimed in this action.

A location of a tract of land by one party in ejectment, not counter-located by the other, is admitted to be correct; that is, that the land is correctly described on the plots; but it does not admit the title to the land.

To recover in ejectment, when defence is taken on warrant, the plaintiff must shew the true position of the land by location, and also that he has a legal right to the land thus located.

The law is well established, that facts to aid a title may, in some cases, be presumed.

The law will always lean to the presumption that a trustee has faithfully executed his trust.

Every fair legal presumption ought to be allowed in favor of a judicial sale, where the purchase money has been *bona fide* paid.

A trustee in the year 1795, under a decree of the Court of Chancery, sold certain real estate, and returned a report of the sale and proceedings, upon which the Chancellor passed the usual order of confirmation *nisi*. In 1808, the trustee executed a deed to the purchaser, which recited the sale, its ratification, and the payment of the purchase money. It did not appear from the record of the proceedings in Chancery, that the sale had been finally ratified. The deed of the trustee being relied upon as evidence of title in the year 1826, *Held*, That the jury might, and ought, to presume that the return of the sale, as reported by the trustee, had been finally ratified and confirmed.

APPEAL from Frederick County Court. Ejectment for a tract of land called the Resurvey on Panmure, lying in Frederick County. The declaration contained counts on the joint and separate demises of the lessors to the plaintiff, on the 2nd of January, 1812, for **116** * twenty years. The defendant, Robinson Eastburn, whose heirs-at-law the appellees are, appeared after his death, and entered into the common rule, and took defence on warrants, and pleaded not guilty, to which issue was joined. A warrant of resurvey was issued, and plots were returned, with sundry depositions of witnesses taken on the survey.

1. At the trial, the plaintiff gave in evidence to the jury, the plots and explanations filed in this cause; also the patent for the tract of land called Panmure, granted to John Cary on the 30th of November, 1752, for 50 acres; also the patent for the tract of land mentioned in the declaration, called the Resurvey on Panmure, granted to John Cary on the 4th of July, 1754, for 375 acres. The plaintiff also proved, that John Cary, the patentee of the tract of land called Panmure, and also the patentee of the tract of land called The Resurvey on Panmure, was dead, leaving John D. Cary, Robert T. Cary, William Cary and Elizabeth Cary, as his only children and heirs-at-law; that Elizabeth died without issue. The plaintiff further gave in evidence a deed from the said John D., William and Robert T. Cary, to Jacob Young and George French, executed after the death of the said John Cary, the patentee of the said land, and also executed after the death of the said Elizabeth, dated the 8th of August, 1791, whereby they conveyed "to the said George French and Jacob Young, their heirs and assigns, the three following tracts or parcels of land: Zero, containing 53 acres, Panmure, containing 375 acres, and part of Palentine, containing 178 acres; all lying between Catoc-tin and South Mountains in Frederick County aforesaid, reference being had to the said patents and deeds will more fully appear." In trust that the said French and Young "and their heirs, shall dispose of the fee simple in the said three tracts or parcels of land, in convenient time, for the best price that they can obtain, and within a rea-

sonable time after the disposal thereof, divide the moneys therefrom arising among the said William Cary and Robert T. Cary, and the creditors of John Dow Cary, first satisfying * judgment creditors, as to them the said George French and Jacob Young 117 shall seem just and equitable, so that the said John D., William and Robert T., shall each bear a proportion of the balance due on a judgment of Cornelius and John Thompson and Ann M'Donald, complainants, and Mary, John D., William and Robert T. Cary, defendants, for which a proceeding is now in Chancery against them; and that the said John D. and William may be reimbursed so much as they may have satisfied of the said debt more than their equal proportion." Covenant by French and Young, that they and their heirs will, within a convenient time, dispose of the said three tracts of land for the best price, &c. Covenant by John D. Cary, &c., with French and Young, their heirs, &c., against the claim of all and every persons, &c. The plaintiff also gave in evidence a deed from Jacob Young to George Scott, dated the 28th of July, 1803, reciting that the said Young and George French, (deceased,) "were appointed by the Court of Chancery trustees for the sale of real estate of John, Robert and William Cary, as will more fully appear by reference to the decree of the said Court, directing the said sale; and the said trustees did expose to sale the said real estate, according to the terms of the said decree, at which said sale the said George Scott did become the purchaser of lots No. 1, 2 and 5, (as will be more particularly described) part of the said real estate, at and for the price of £727 2 4½ in the whole, which said purchase money the said George Scott has paid; and the said sale, made by the said trustees, has been confirmed by the Chancellor; and the said George French is now dead." The said Young, in virtue of the said decree, &c. did convey to the said George Scott, his heirs and assigns forever, "all those parts of the following lands, lying in Frederick County, to wit: Lot number one, being part of The Resurvey on Panmure, beginning," &c. containing 115½ acres; "also lot number two, being part of The Resurvey on Panmure, beginning," &c. containing 139½ * acres; 118 also lot number five, being part of the Resurvey on Panmure and Zero, beginning," &c. containing 43 acres, &c. The plaintiff also offered in evidence, the record and proceedings in a cause between the said George Scott's lessee, plaintiff, and Robinson Eastburn, defendant, tried in Frederick County Court, and judgment therein rendered at February Term, 1808, in favor of the plaintiff, and a writ of *hab. fac. pos.* issued on the said judgment, and possession of the premises delivered to the plaintiff on the 27th of June, 1808. By this record it appears that an action of ejectment was instituted in Frederick County Court on the 17th of February, 1804, in the name of George Scott's lessee against Robinson Eastburn, for the recovery of a tract or parcel of land called The Resurvey on Panmure, containing 375 acres; also a tract of land called Zero, contain-

ing 53 acres; also a tract of land called Palentine, containing 319 acres; also a tract of land called West Indies, containing $8\frac{1}{2}$ acres. The defendant in that action appeared and entered into the common rule, and took defence on warrant, &c. A warrant of resurvey issued, and plots were returned, &c. And at the trial the jury by their verdict found the true location of the tract of land called The Resurvey on Panmure, as located by the plaintiff on the plots, beginning at I, and running, &c. And the jury found for the plaintiff all the land for which the defendant took defence, included within the above location of The Resurvey on Panmure, except so much thereof as was included in the Ram's Horn, as located by the defendant in red drawn lines, with three degrees for variation. And as to the residue of the land claimed by the plaintiff, they found for the defendant. Judgment was rendered on the verdict in favor of the plaintiff for possession and costs, &c. On the 3rd of May, 1808, a writ of *hab. fac. pos.* issued, and possession delivered to the plaintiff of the land so recovered. The plaintiff also gave in evidence a deed from George Scott to Robert Cheney, dated the 3rd of August, 1809, reciting that Scott

119 * did by his agreement with William Cheney, deceased, dated the 31st of May, 1804, and by his bond of conveyance, &c. agree to convey to the said W. Cheney certain lands therein mentioned; that W. Cheney is since dead intestate, leaving brothers and sisters his heirs-at-law, of whom the above mentioned Robert Cheney is one, who filed his bill in Frederick County Court, praying a division or sale of the real estate of the said William Cheney, deceased, under the Act to Direct Descents. On which proceeding the said Robert Cheney elected to take the said estate at the valuation, and pay to the other heirs their respective proportions in money, which was confirmed by the Court, &c. That the said Robert Cheney had received from the heirs of William Cheney a general power of attorney to act for them in all things relative to the said estate, as by reference to the said power of attorney, dated the 7th of August, 1806, will appear. The said George Scott conveyed to the said Robert Cheney, and his heirs, all his the said Scott's right, &c. to all those three several tracts or parcels of land, &c. to wit: Lot No. 1, being part of a tract of land called The Resurvey on Panmure, beginning, &c. containing 115 acres. Lot No. 2, being part of a tract of land The Resurvey on Panmure, and part of a tract called West Indies, beginning, &c. containing $125\frac{1}{2}$ acres. Lot No. 5, being part of a tract of land called The Resurvey on Panmure, and part of a tract called Zero, beginning, &c. containing $44\frac{1}{2}$ acres. The said three parcels or lots of land said to contain $284\frac{1}{2}$ acres, more or less. The plaintiff also gave in evidence a deed from Robert Cheney, attorney in fact for the heirs and legal representatives of William Cheney, deceased, to the lessors of the plaintiff, as heirs-at-law of Henry Shilknecht, deceased, as tenants in common, and not as joint tenants, dated the 26th of August, 1809, reciting that William Cheney,

deceased, in his life-time, agreed to sell and convey to a certain Stotlemeyer, two parcels or tracts of land particularly described in his bond of conveyance, dated the 5th of July, 1804. That Stotlemeyer relinquished his title * to the said tracts of land unto Henry Shilknecht; that the said William Cheney and Henry Shilknecht are both dead, no deed of conveyance of the said lands having been executed. The said Robert Cheney conveyed to the lessors of the plaintiff, in consideration of the premises, &c. all those two parts of tracts or parcels of land, viz: Lot No. 1, it being part of a tract of land called The Resurvey on Panmure, beginning, &c. containing 115 acres. Also, part of a lot No. 2, being part of the tract of land called The Resurvey on Panmure, beginning, &c. containing 6 acres. The deed was signed and sealed by Robert Cheney, as attorney in fact for the heirs and legal representatives of William Cheney, deceased, and by him acknowledged on the same day before one of the Associate Judges of the judicial district. Whereupon the defendant, by his counsel, prayed the Court to direct the jury, that the said deed from Jacob Young to George Scott, under the evidence offered, conveyed no title to the said Scott. Which direction the Court (SHRIVER and T. BUCHANAN, A. J.) gave to the jury. The plaintiff excepted. 120

2. The plaintiff, in addition to the evidence by him offered in the preceding bill of exceptions, gave in evidence the record and proceedings in a case in the Court of Chancery, upon the application of John D. Cary, Robert T. Cary, William Cary, Jacob Young and George French. This record states, that John D. Cary on the 9th of October, 1792, petitioned the Chancellor for the benefit of an insolvent law, passed at November Session, 1791, ch. 73, in which he was included among other petitioning debtors. A list of his creditors was exhibited with his petition to the Chancellor; also a schedule of his property, real, personal, and mixed. The usual and customary proceedings were had. And it appears, that on the 4th of March, 1793, George Scott was appointed trustee for the benefit of the creditors of John D. Cary; and afterwards, on the 4th of January, 1794, but for what cause does not appear, George French was appointed the trustee, who entered into a * bond as such. On the 14th of January, 1795, George French, the trustee, filed a petition 121 by himself, Jacob Young, John D., William and Robert T. Cary, to the Chancellor, stating that the said French and Young were appointed by the Carys above mentioned, as trustees, by a deed, to sell certain property; but that French and Young earnestly wishing, for the satisfaction of every person interested, that the Chancellor would direct in what manner and on what terms, the said property should be sold, prayed that the Chancellor would take the same into consideration, and appoint the said French and Young to sell the property in the deed mentioned, for the purpose therein expressed. The deed was exhibited as herein before referred to, dated the 8th

of August, 1791. Also the will of John Cary, dated the 23d of November, 1773, whereby he devised, among other things, as follows: "Item. I give and bequeath to my son, Robert Turner Cary, all those pieces of land lying on Catoctin Creek, and on the east side thereof, being part of Panmure, and part of Palatine, and also part of Zero, to him, his heirs and assigns, forever. Item. I give and bequeath to my son, David Cary, all that part of a tract of land called Panmure, which lies on the west side of Catoctin Creek, and also that part of a tract of land called Zero, lying on the west side of said creek, to him, his heirs and assigns, forever." The Chancellor, [HANSON,] on the 14th of January, 1795, decreed "that the said George French and Jacob Young do proceed to sell at public auction, either entire, or in such parcels as they shall judge most convenient, the lands conveyed to them in trust to be sold, by John D., William and Robert T. Cary, by indenture executed on the 8th of August, 1791, the purchaser or purchasers of each parcel giving bond, with security, to the said trustees, as such, for paying one-half of the purchase money, with interest, within one year, and the residue, with interest, within two years from the time of sale: Provided, that before the trustees proceed to sell, they shall give notice of the time

122 * or times, place or places, manner, and terms of sale, by advertisement inserted three weeks successively in some convenient newspaper, and set up," &c. That they should return to the Court a full and particular account of their proceedings under the decree, with an affidavit of the truth thereof annexed. Also the bonds taken from the purchasers. "And upon the Chancellor's ratification of the sale, and receiving the whole purchase money, and not before, the said trustees, or either of them, by a good deed, shall give, &c. unto the purchaser or purchasers, and his, her or their heirs, the land to him, her or them sold," &c. That the trustees bring the money into Court, to be applied under the directions of the Chancellor, according to the intentions of the said deed of trust, &c. On the 24th of October, 1795, the trustees reported, that after giving three weeks public notice, &c. the said Jacob Young on the 3d of March, 1795, exposed to public sale lot No. 1, containing $211\frac{1}{2}$ acres, lying on the west side of Catoctin Creek, at 40 shillings and 7d. per acre, to Jacob Rhodes; but Rhodes not being able to bond for said lot, &c. the said Jacob Young had since sold the said lot to George Scott, at the same price, for which the said Scott had bonded. That the said Jacob Young sold at public sale to the said George Scott, lots No. 2 and 5, lying on the west side of the said creek, at the price of 44 shillings per acre; lot No. 2, containing $139\frac{1}{2}$ acres, and of No. 5, containing 43 acres; for both of which lots the said Scott had bonded. That the said Jacob Young sold at public sale to Joseph Eller, lot No. 3, lying on the west side of the said creek, containing 10 acres, at the price of 54 shillings per acre, &c. That the said Jacob Young sold at public sale to the said Eller, lots No. 4, 6,

and 7, lying on the east side of the said creek, at 34 shillings per acre; lot No. 4, containing $97\frac{1}{2}$ acres; lot No. 6, containing 48 acres; and lot No. 7, containing 167 acres. That three weeks public notice was not given of the sale of the lots on the east side of the said creek; but the said Young being of opinion that a good * price might then be obtained for the said lots, although not **123** advertised, according to the directions of the said decree, exposed them to sale, and got the price aforesaid, which in the opinion of the said George French and Jacob Young, is a very good price. The trustees reported, that the sales of the said lands amounted to £1,286 4 $\frac{1}{2}$ current money. To this report was annexed an affidavit of its truth. The trustees also reported a survey, directed by them to be made of the lands directed to be sold, and of its division into seven lots, &c. On the 31st of October, 1795, the Chancellor ordered that the report of George French and Jacob Young, trustees, &c. be ratified and confirmed, unless cause to the contrary be shown, on or before the third Tuesday in December then next; provided a copy of the order be inserted in the Fredericktown newspapers at any time before the last of November. The trustees afterwards filed the following printed extract from a newspaper: "In Chancery, January 8th, 1796.—Ordered, That the report of George French and Jacob Young, trustees for the sale of the real estate of John, Robert and William Cary, be approved, and that the sales by them made, as stated in said report, of the property in lots, for £1,286 4 $\frac{1}{2}$, in the whole, be ratified and confirmed, unless cause to the contrary be shown, on or before the third Tuesday in March next; provided this order be inserted in the Fredericktown newspapers at any time before the 10th of February next.—Test, Samuel Harvey Howard, Reg. Cur. Can." On the 28th of April, 1803, Ariana French, executrix of George French, filed her petition to the Chancellor, stating that "by a decree, Jacob Young and George French, deceased, were appointed trustees to sell the real estate of John D., Robert and William Cary; that the said trustees sold the real estate according to the said decree, and reported to this Court, which report has been ratified and confirmed. That George French is since dead, and that she is his executrix. That at the time of the decree, and at the time of executing the deed of trust to the said Young and French, upon which the decree was * predicated, there were sundry judgments **124** against the said Carys, charging and incumbering the lands deeded in trust and decreed to be sold, which judgments are particularly stated in the amounts of payments and disbursements filed in this Court by the said Young as surviving trustee. That George Scott, a purchaser of part of the land sold, owes a considerable sum of the purchase money, which, with interest, he is ready to pay to the surviving trustee. That the judgments paid by the trustees were paid in succession according to their priority, and that the next oldest judgment is the one obtained by Thomas Beall for the use of Arch-

ibald Orem, against John D. Cary and George French, at May Term, 1789, a short copy of which is exhibited. That George French was only security for the said Cary, and was not principal in the bond upon which the judgment was obtained, the debt being due by Cary himself. That the said French, in his life-time, and the petitioner, had paid the said judgment, and that the said Cary, or his trustees as such, have paid no part thereof. Prayer, that as much of the purchase money due for the real estate sold under the said decree, as will satisfy the said judgment, with interest, &c. be paid by the said Young, the surviving trustee, to the petitioner, &c." Proof of the payment, &c. was exhibited. On the 21st of April, 1803, the Chancellor, on the above petition, proof, &c. being "of opinion that the petitioner having discharged the judgment obtained by Thomas Beall, for the use of Archibald Orme, against John D. Cary and George French, the said French being only a security for said Cary, is entitled to be in the place of the said Orme." The plaintiff also gave in evidence, that David Cary, mentioned in the will of John Cary, the patentee, died in his infancy, intestate, and without issue, long before the deed of the said John D., Robert T. and William Cary, to Jacob Young and George French. Whereupon the plaintiff prayed the opinion and direction of the Court to the jury, that from the facts given in evidence in this cause, they may and ought to pre-

125 sume, that the return * of sales, as reported by the trustees in the said proceedings in Chancery, was finally ratified and confirmed by the Chancellor. But the Court [SHRIVER and T. BUCHANAN, A. J.] were divided in their opinion as to the direction prayed for as aforesaid. Wherefore they did not give the opinion and direction prayed for by the plaintiff. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Ross, for the appellant, on the 1st exception, referred to 2 *Blk. Com.* 308, 309; *Bolton vs. Bishop of Carlisle*, 2 *H. Blk.* 263, 264; *Doe vs. Bingham*, 6 *Serg. & Low.* 562; *Roe, ex dem. Berkely vs. Archbishop of York*, 6 *East*, 101; *Shepherd vs. McEver*, 4 *Johns. Ch.* 136; *Jackson vs. Neely*, 10 *Johns.* 386; *Huntington vs. Havens*, 5 *Johns. Ch.* 27; *Run. Eject.* 400, 401, 435; *Jackson vs. Woolsey*, 11 *Johns.* 509; *Morris vs. Rosser*, 3 *East*, 15; *Jackson vs. Schaubert*, 7 *Cowen*, 201. On the 2d exception, to 3 *Stark. Ev.* 1235, 1251; *Eldridge vs. Knott, Cowp.* 215; *Hillary vs. Waller*, 12 *Ves.* 251, 256; 2 *Saunders' Law. Ev.* 728; *Fenwick vs. Reed*, 7 *Serg. & Low.* 80, 81; *Donn vs. Lewis*, 11 *Ves.* 601; *Bank U. S. vs. Dandridge*, 12 *Wheat.* 69, 70; *Ricard vs. Williams*, 7 *Ib.* 109, 110.

Nelson and F. A. Schley, for the appellees, on the 1st exception, cited *Mann vs. Pearson*, 2 *Johns.* 37; *Lodge vs. Lee*, 6 *Cranch*, 237; *Dorsey vs. Hammond*, 1 *H. & J.* 193; *Buchanan vs. Stewart*, 3 *Ib.* 329;

4 *Yeates' Rep.* 577; *Barr vs. Gratz*, 4 *Wheat.* 213, 221; *Penrose vs. Griffith*, 4 *Binney*, 231; 1 *Stark. Ev.* 369, (note); 4 *Cruise*, 37; 1 *Saund. L. Ev.* 7; *Barr vs. Gratz*, 4 *Wheat.* 220; *Barney vs. Patterson*, 6 *H. & J.* 203; *Ham. Dig.* 448. On * the 2d exception, they referred to *Lake vs. De Lambert*, 4 *Ves.* 592; 1 *Stark. Ev.* 152; 3 *Inst.* 126 173; *Orndorf vs. Mumma*, 3 *H. & J.* 70, 71; 4 *Com. Dig. tit. Ev.* (A. 4.) 89; 3 *Stark. Ev.* 1251; *Knight vs. Dauler*, *Hard. Rep.* 324; *Cockey vs. Smith*, 3 *H. & J.* 27; *Sugd.* 32; *Anonymous*, 2 *Ves. Jr.* 335; *Annesley vs. Ashurst*, 3 *P. Wms.* 282, 283; *Ex parte Minor*, 11 *Ves.* 559; *McHen. Eject.* 151, 152; *Goodtitle vs. Duke of Chandos*, 2 *Burr.* 1071, 1076; *Causwell vs. Vaughen*, 2 *Saund. Rep.* 42 a, (note); *Yard vs. Ford*, *Ib.* 175; 3 *Stark. Ev.* 1284, 1285; *Eldridge vs. Knott*, 1 *Cowp.* 215; *Hillary vs. Waller*, 12 *Ves.* 251, 264; 2 *Saund. Ev.* 728; *Ricard vs. Williams*, 7 *Wheat.* 109, 110; *Hopkins vs. Hopkins*, 10 *Johns.* 380, 381; *Carroll vs. Norwood*, 1 *H. & J.* 172; 3 *Ib.* 27; *Beall vs. Lynn*, 6 *H. & J.* 351.

Ross, in reply, cited, on the 1st exception, *Hawkins vs. Hanson*, 1 *H. & McH.* 528; *Dorsey vs. Hammond*, 1 *H. & J.* 193; *Buchanan vs. Stewart*, 3 *Ib.* 329, 339; *Lodge vs. Lee*, 6 *Cranoh*, 237; *Roe, ex dem. Berkely vs. Archbishop of York*, 6 *East*, 105, 106; *Barr vs. Gratz*, 4 *Wheat.* 221; 4 *Yeates' Rep.* 577; 1 *Saund. Ev.* 7, 51; *Hopkins vs. Lee*, 6 *Wheat.* 113; *Chirac vs. Reinecker*, 11 *Wheat.* 296; *Outram vs. Morewood*, 3 *East*, 346. On the 2d, to *Anderson vs. Foulke*, 2 *H. & G.* 353, 356, 357, 359; *Weems vs. Brewer*, *Ib.* 401.

MARTIN, J. delivered the opinion of the Court. In the argument of this cause, several points have been brought into view by the counsel for the appellant, which cannot be noticed in the decision. The ejectment was tried in 1826, of course, is embraced by the Act of 1825, ch. 117, and this Court can only review such questions of law, as were acted on by the Court below. In the first bill of exceptions, the only question decided by the Court below, was that the deed from Young to Scott, made in 1803, under the evidence offered, conveyed no title to the said Scott; and in * the second bill of excep- 127 tions, the Court decided upon the question, whether the jury might presume from the evidence, that the sale reported by the trustee, under the decree of Chancery, was finally ratified and confirmed.

By the recitals in the deed of 1803, it appears, that French and Young were appointed by the Court of Chancery, trustees, to sell certain real estate of John, Robert, and William Cary—that the said trustee did expose to sale the said real estate, and that George Scott became the purchaser of part, and has paid the purchase money. It then states that French was dead, and that Young, in virtue of the decree of the Court of Chancery, did convey to the said Scott, his heirs and assigns, for ever, lots No. 1, 2, and 5, being part of a tract of land called “the Resurvey on Panmure, and Zero,” &c.

This deed clearly shews on the face of it, the character in which French and Young acted; and to give it legal effect and operation as a deed under the decree of the Court of Chancery, a copy of the record ought to have been produced, to shew the trust reposed in them, and their legal performance of it. Although this deed could not have legal operation as a deed under the decree of Chancery, without producing a record of the proceedings, it shall be taken most strongly against the grantor, and if he had a legal interest in the land, that could be transferred by an ordinary deed of bargain and sale, the Court ought to give it effect as such.

On the 8th of August, 1791, the legal estate in both Panmure, and the Resurvey on Panmure was vested in John, Robert, and William Cary, and by a deed of that day, they conveyed to French and Young, as joint tenants, in fee, the tracts of land called Zero, and Panmure, containing 375 acres, and part of Palentine, in trust, &c. By this deed, the legal estate in Panmure was vested in French and Young, as trustees, in joint tenancy. Although they were trustees, yet the legal estate vested in them jointly, and either could at law, convey his undivided moiety in the * land. The land having
128 been sold by French and Young, if French died, Young could convey the whole interest in the land to the purchaser. If French was alive, still as Young was seized as joint tenant in fee, of an undivided moiety with French, by his separate deed of 1803, all Young's legal estate passed to Scott, the grantees.

The land in dispute in this ejectment, is lot No. 1, part of the Resurvey on Panmure; and to make the deed of 1803 available to the plaintiff, it must convey an interest not only in Panmure, but in lot No. 1, part of the Resurvey on Panmure. Whether it has this effect, must depend entirely on the legal operation of the deed of 1791.

This deed conveys Panmure, containing 375 acres, without giving any description of the land intended to be conveyed, by courses and distances expressed in the deed. If there is nothing to aid the legal operation of this deed, it can only convey Panmure; for certainty, a deed for one tract of land, cannot *per se*, convey another tract. No testimony has been introduced to shew, that Panmure and the Resurvey on Panmure, are the same tract, but called by different names, and as before observed, no description of the land intended to be conveyed, by courses and distances, is given in the deed, to extend the land beyond that conveyed by name. The number of acres in the deed, being more than Panmure contains, cannot alone effect that object, and the reference to the patents, in legal intendment, can only relate to the patents of Zero, and Panmure.

It has been supposed, the location of the deed of 1791, on the plots, not being counter-located by the defendants, is an admission by them, that Panmure, and The Resurvey on Panmure, are but one tract of land. A location of a tract of land, by one party in ejectment not counter-located by the other, admits the location to be

correct—that is, that the land is correctly described on the plots; but it does not admit the title to the land thus located—this must still be proved. To recover in ejectment, when defence is taken on warrant, the plaintiff must shew the true position of the land * by location, and also, that he has a legal title to the land thus located. The admission in this case to the greatest extent, is only, that the deed of 1791, is correctly laid down by the plaintiff, on the plots; but still requires him to shew that this deed, by its legal operation, conveyed the lands thus located. The deed, from any thing that appears in this record, could only convey to the grantees, Panmure, according to the lines, metes, and bounds, of that land, and as Young's title was derived from that source alone, his deed of 1803, could transfer no title to the land in controversy in this ejectment, that being part of the Resurvey on Panmure, and not included within the lines of the original tract. We concur in opinion with the Court below, that the deed of 1803, conveyed no title, that could avail the plaintiff in this ejectment. **129**

The Court having decided against the plaintiff as to the operation of the deed of 1803, under the evidence then offered, he, in addition to that contained in the first bill of exceptions, produced a copy of the record of the proceedings in Chancery—a petition to the Chancellor, by Ariana French, and the order of the Chancellor thereon. He then prayed the opinion and direction of the Court to the jury, that they may, and ought to presume, from the facts given in evidence in the cause, that the return of sales, as reported by the trustees in the proceedings in Chancery, were finally ratified and confirmed. The Court were divided in opinion, and did not grant the direction as prayed for by the plaintiff.

It appears from the record of the proceedings in Chancery, that a petition was filed by John, Robert and William Carey, and French and Young, praying the Chancellor to appoint French and Young trustees to sell certain real estate that had been conveyed to them by the said Careys in trust. That a decree passed accordingly. That French and Young, as trustees under this decree, sold the said real estate, and George Scott became the purchaser of part of the same. A report of this sale was returned to the * Chancellor, who, on the 31st of October, 1795, passed an order of confirmation, *nisi*, &c., but it does not appear from the record that the report of the sale was finally ratified and confirmed. **130**

The law is well established, that facts to aid a title may in some cases be presumed, and the question now presented to us is whether the evidence in this cause was sufficient to justify the jury in presuming the report of the trustees was finally ratified and confirmed.

The decree was passed in the year 1795; the sale under that decree; the report of the trustee was returned; and the order of confirmation, *nisi*, &c. all in that year. The deed from Young to Scott, in 1803, and this ejectment, was tried in 1826. At least thirty years

elapsed between the order *nisi* and the trial of the cause, and twenty-two years between the deed to Scott and the trial.

The decree in express terms directs that no deed shall be given until the report of sales shall be finally ratified and confirmed, and the purchase money paid. It is not to be intended the trustee disregarded this injunction. He had no interest in violating it, and the law will always lean to the presumption that a trustee has faithfully executed his trust. Here is a deed under the decree of Chancery which ought not to have been made, unless the report had been finally confirmed; and upon the hypothesis that the report was finally confirmed, is the only fair way to account for it. This presumption is strongly sustained by the other evidence in the cause. The petition of Ariana French, although not of itself sufficient to create the presumption, may be called in aid of other evidence to effect that purpose. This petition was filed in 1803, the same year in which the deed was executed, and but a few years after the order of confirmation, *nisi*. It was almost a cotemporaneous act with the deed. This petition states the decree of the Chancellor; the report of sales made under that decree; that the report had been finally ratified and confirmed, and that Scott, the purchaser, was ready to

131 pay the purchase * money. It further states, that Archibald Orme was entitled to part of the purchase money, the proceeds of the sale under the decree of Chancery, and prays the petitioner (from the facts stated in her petition) may be substituted in the place of Orme, and that the trustee may be directed to pay her claim. The Chancellor, in his order, says he has considered the petition with the vouchers and proofs therewith filed, and directs the petitioner to be substituted in the place of Orme. It may be true that this substitution might have been directed, although no proceedings had taken place to sell the land; but when the petitioner states the proceedings as the foundation of her claim, and the Chancellor declares he had considered the petition with the vouchers and proof therewith filed, is it not fair to conclude he was satisfied of the truth of the facts as stated in the petition? It was then a recent transaction, and in his own Court.

In 1804, an action of ejectment was instituted by Scott, the grantee in the deed of 1803, against Robinson Eastburn (who was originally the defendant in this ejectment,) to recover the same land now claimed. This case was tried in 1808, when there was a verdict for the plaintiff, judgment, and a writ of possession. In both ejectments the defence was taken on warrants, and the defendant took defence, not for all the land claimed, but only for so much thereof as was included within the lines of other tracts. The possession of a great part of the land intended to be conveyed by the deed of 1803, has, from that time, been in the grantee named in the deed, and those who claim under him, and only part has been disputed as being within the lines of other tracts.

When we view the whole evidence, the presumption appears irresistible that all was done in Chancery that was necessary to give legal effect to this deed under the decree. This was a judicial sale, the purchase money *bona fide* paid, and every fair legal presumption ought to be allowed to sustain it.

Judgment reversed, and procedendo awarded.

* GLENN, Trustee of PEASE vs. VON KAPFF.—June, 1830. **132**

An insolvent debtor who has obtained his final discharge, and released to his trustee all his interest in the property in dispute, and residue of his estate after paying his debts is a competent witness in an action in which his trustee is plaintiff, to prove, that at the time a certain deed was executed by such witness and his partner to the defendant, who was their creditor, they contemplated becoming insolvent debtors, and apprised the defendant of such intention, who advised them to make such deed, and then apply for the benefit of the insolvent laws, and promised to aid them thereafter, though the effect of such testimony would be to avoid his deed, under our insolvent system. (a)

APPEAL from Baltimore County Court. Action of trover. The declaration stated that the plaintiff (now appellant,) on the 29th of June, 1824, was lawfully possessed, as of his own property, of the lease of two small brick buildings, and one frame building and shed, and one steam boiler, &c. and sundry other articles then contained in the said brick and frame building and shed, of great value, &c. and being so possessed thereof, he afterwards, to wit, &c. casually lost the said lease, and the above recited and enumerated goods, &c. out of his possession; and the same afterwards, &c. came to the possession of the defendant, (the appellee) by finding. Yet, &c. The defendant pleaded not guilty, and issue was joined.

At the trial the plaintiff offered in evidence the petitions and insolvent papers of Adriel Pease and John N. Schultze. The petition of Pease to the commissioners of insolvent debtors, was dated 7th January, 1824. The appellant was appointed his permanent trustee, before the institution of this suit, and Pease was finally discharged by the County Court, under the Insolvent Debtors' Act, on the 25th September, 1824. Similar proceedings were proved in relation to Schultze; and also that the various articles mentioned in the declaration in this cause, were on the — day of January, 1824, the property and in possession of Pease the insolvent. The name of the defendant was not mentioned as a creditor in the insolvent's petitions and papers.

(a) Cited in *Beatty vs. Davis*, 9 Gill, 220.

133 * The defendant gave in evidence certain contracts between him and the insolvents, which need not be stated, and the bill of sale, dated 5th January, 1824, from the insolvents to him for the articles mentioned in the declaration. The plaintiff then called John N. Schultze, one of the parties to the said bill of sale, who released to his trustee all his interest in and to said property, and to any residue of his estate which might remain after paying his debts, and offered to prove by such witness, that at the time the said bill of sale was executed, Pease and Schultze contemplated becoming insolvent debtors, and apprised the defendant of such intention, who advised them to make the bill of sale to him, and then to apply for the benefit of the insolvent laws; and also promised to aid them as soon as they obtained the benefit of said laws; and that the said bill of sale was executed with intent to give the defendant an undue and improper preference over the other creditors of Pease and Schultze, and every of them. To the admissibility of which witness to prove all or any of the above facts, the defendant objected, 1st. Because the said witness was a party to the said bill of sale, and cannot be heard in a Court of law, to impeach his own deed; and 2d. Because it was not competent for him to give evidence to show that he contemplated being or becoming insolvent, within the view of the Acts of Assembly for the relief of insolvent debtors. And the Court [ARCHER, C. J., and HANSON, A. J.] being divided in opinion as to the admissibility of the said witness to prove the aforesaid facts, the said witness was rejected. The plaintiff excepted; and the verdict and judgment being against him, he appealed to the Court of Appeals.

This cause came on to be argued before BUCHANAN, C. J., EARLE, and MARTIN, JJ.

Johnson and Frick, for the appellant, cited *Butler vs. Cooke*, *Cowper's Rep.* 70; *Archbold's Digest*, 435, 438; *Masters vs. Drayton*, 2 *Term Rep.* 497; *Walton vs. Shelly*, 1 *Term Rep.* 496; *Bent vs. Baker*, 3 *Term Rep.* 32; *Kenyon's Opinion*, 34; *Pleasants vs. Pemberton*, 2 *Dallas*, 197; *Barring vs. Shippen*, 2 *Binney*, 154, 168; *Winton vs. Saidler*, 3 *Johns. Cas.* 185; *Jackson vs. Frost and Haff*, 6 *Johns.* 135; 1 *Philips' Ev.* 33, 34, (note a;); *Wilson vs. Lenox*, 1 *Cranch*, 201; *Ringgold vs. Tyson*, 3 *H. & J.* 172; 3 *Stark. Evid.* 17, 37; *Rands vs. Thomas*, 5 *Maule and Selw.* 244; 2 *Stark. Ev.* 298, (note c;); 1 *Harrison's Index*, 511, 513; *Howard vs. Mitchell*, 14 *Mass. Rep.* 241.

Mayer and Learned, for the appellee, referred to the Act of 1805, ch. 110. The Act of 1812, ch. 77. 1816, ch. 121, sec. 6. They contended, that the deed to the appellee did not give preference, so as to invalidate it under the Act of Assembly. *McMechen vs. Grundy and Sons*, 3 *H. & J.* 185. They cited likewise *Graves vs. Delaplaine*, 14 *Johns.* 146; *Wesley vs. Thomas*, 6 *H. & J.* 24; 2 *Stark. Evid.* 211;

Revere vs. Leonard, 1 Mass. 91; 1 *Day Rep.* 17; 2 *Ib.* 131; *Cantee vs. Sumter*, 2 *Bay South Car. Rep.* 93; 1 *Stark. Evid.* 206, 302.

BUCHANAN, C. J. delivered the opinion of the Court. It is a settled, general rule of evidence in this State, that every person not interested in the event of the suit is a competent witness; the objection going to his credibility rather than to his competency. Here the suit was brought * by the trustee of an insolvent debtor; it is an action of *trover* for certain goods held by the defendant, under a bill of sale executed to him by the insolvent, two days before the date of his application for the benefit of the insolvent laws. And the insolvent himself, being produced to prove, that at the time of executing the bill of sale to the defendant, (who is stated to have been a creditor,) he contemplated becoming an insolvent debtor, and so informed him. His testimony was objected to, on the ground that he could not be heard in a Court of law to impeach his own deed, and his testimony was rejected, upon a misapprehension we think of the rules of evidence before stated, as prevailing in this State, there being nothing that we can perceive, to exempt it from the operation of that rule. The party offered as a witness having released to the trustee all his interest in the property in dispute, and in any residue of his estate which might remain after paying his debts, he had no apparent interest in the event of the suit, and the objection, if any, was to his credibility, and not to his competency. This as a general rule must be acceded to from necessity, if not for the preservation of consistency in the practical application of the law of evidence. **135**

If there are cases in which a man shall not be called to impeach or invalidate an instrument which he has signed, they are exceptions; and we can perceive nothing to bring this case within the exception.

By the insolvent laws a deed or assignment made to a creditor or security, with the expectation of becoming an insolvent debtor, and with the intent to give an undue preference to such creditor or security, is declared to be void, and the property attempted to be conveyed or assigned, to vest in the trustee of the insolvent debtor. The intention of the insolvent at the time of making the bill of sale in question, was the matter proposed to be proved, and that lying in his own breast, and being a matter difficult, if ever to be proved in such cases, except by disclosures by the party himself, it would seem to be a case peculiarly fit for * the admission of his testimony; and we think the Court below did wrong in rejecting it. **136**

Judgment reversed, and procedendo awarded.

ALLEGRE'S Adm'rs vs. THE MARYLAND INSURANCE COMPANY.
June, 1830.

Orders for, and contracts of insurance are to be liberally construed, and with reference not only to the situation and circumstances of the subject-matter of insurance, but also of the parties by whom the insurance is effected.

So an application for insurance from Rio de la Plata to Havana, which stated "said vessel will sail from La Plata in the course of this month," made by a merchant in Baltimore, to an insurance company there, is not to be regarded as a technical representation of the time of the vessel's departure, but as a statement merely of the belief, or opinion of the applicant, that she would sail at the time mentioned. (a)

In an action on a policy of insurance, the question, whether the risk has been materially increased by the sailing of the vessel on her voyage, at one time, instead of another, ought not to be submitted to the jury, when no testimony whatever had been adduced on the subject, to warrant the jury in drawing such a conclusion.

It is competent to offer evidence, whether, according to the custom and usage of insurance companies, the word cargo, in an order for insurance, would be considered as covering live stock. (b)

A policy on cargo, or goods and merchandise, will not cover articles which are stowed upon deck.

Good faith and fair dealing are the very essence of the contract of insurance, and it is the duty of the assured to communicate every fact which can influence the mind of any prudent insurer in determining whether he will underwrite the policy at all, or at what premium he will underwrite it. (c)

The word cargo, in an order for insurance, does not, ordinarily, cover live stock: but if live stock constitute the only article of exportation from the port from which the vessel carrying the insured property is to sail, to the port to which she is destined; or if, according to the mercantile usage of the place of effecting the insurance, the word cargo is understood to cover live stock, then an insurance under that general denomination, will cover live stock.

The existence of such usage, when evidence is offered for and against it, is a question exclusively for the jury.

Uniformity of decision among the several States of the Union, on questions connected with contracts of insurance, is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce the sanction of principles established in the other States.

137 * APPEAL from Baltimore County Court. This was an action of covenant of a policy of insurance. It is the same

(a) Approved in *Augusta Ins. Co. vs. Abbott*, 12 Md. 375.

(b) See *Allegre vs. Ins. Co.* 6 H. & J. 337, note.

(c) Approved in *Allegre vs. Ins. Co.* 8 G. & J. 201; *Ins. Co. vs. Abbott*, 12 Md. 374.

case which was before the Court of Appeals at June Term, 1825, when the then judgment was reversed, and the record remitted to the Court below, with a writ of *procedendo*. 6 H. & J. 408. The death of the plaintiff below was suggested, and his administrators, (the now appellants,) made plaintiffs, &c.

1. At the new trial the plaintiffs offered in evidence the policy of insurance upon which this action was brought, entered into by the defendants (the appellees) on the 23d of May, 1820. The sum subscribed to be insured, was \$6,000. The policy stated, that "whereas J. B. A. Allegre, for the concerned, doth make insurance, and cause himself to be insured, lost or not lost, at and from Rio de la Plata to Havana, with liberty of Martinico, upon all kinds of lawful goods and merchandises, laden, or to be laden, on board the good brig called the Eugene, whereof ——— is master for this present voyage, or whosoever else should go for master in the said vessel. Beginning the adventure upon the said lawful goods and merchandises, from and immediately following the loading thereof on board of said vessel, at Rio de la Plata aforesaid, and so shall continue and endure, until the said goods and merchandises shall be safely landed at ——— aforesaid, &c." The policy was in the usual form, the assured having paid after the rate of 5 per cent. for the assurance. There was a clause, that in case of loss, such loss to be paid in 90 days after proof, &c. And if any dispute should arise relating to a loss, it should be referred to two persons, &c. The second article of the memorandum at the foot of the policy is, "that if the above vessel, after a regular survey, shall be condemned for being unsound or rotten, the company shall not be bound to pay their subscription to this policy." The plaintiffs also gave in evidence, that the brig Eugene sailed from Monte Video, on the River La Plata, on the 12th of July, 1820, for Havana, laden with 106 mules, and 4 jackasses, belonging * to Charles A. Chalumeau, for whom the said insurance was effected; **138** that the said brig was in all respects seaworthy; and that in the progress of her said voyage, she encountered tempestuous weather, by which she was much damaged, and the mules and jackasses all killed, except 10 mules; that the said brig was compelled, by the damage aforesaid, and the violence of the winds and waves, to put into Rio de Janeiro, where she was duly and regularly surveyed, and ascertained to be unworthy of being repaired, and thereupon sold; and that the said remaining 10 mules were also thereupon sold; and further proved, that the insured thereupon duly abandoned the cargo aforesaid to the defendants. The plaintiffs also read in evidence by consent, the protest, and other documents. The protest was made and sworn to by the master, mate, and two of the seamen of the brig Eugene, before the Vice Consul of the United States of America, for the port of Rio de Janeiro, on the 19th of August, 1820, detailing minutely all the particulars of the shipment of the cargo on board the vessel, her sailing on the voyage, and the loss sustained. At the

same time, before the said Vice-Consul, the master called for regular surveys, by good and capable men, &c. Then follows a bill of lading, dated the 8th July, 1820, signed by the master of the brig Eugene, and by whom was shipped from Monte Video, and bound to Havana, 106 mules and 4 jackasses. Also an account of the sale of the brig Eugene, condemned, as unworthy of repairs. Also an account of sales of the cargo of said brig. The plaintiffs further read in evidence sundry depositions of witnesses, taken and returned under a commission issued for that purpose from Baltimore County Court, to certain persons, named as commissioners, at Rio de Janeiro; but as the questions decided by the Court below do not seem to depend upon the testimony taken under the commission, which was as to the condition of the vessel on her arrival at Rio de Janeiro, and the injury she had sustained, and as to the survey made of the vessel, and whether she could not have been repaired, &c. it is omitted.

139 * The defendants then read in evidence, by consent, the invoice of the cargo put on board the vessel, and an account of the charges and expenses incurred with the mules and asses, bought as a cargo for the brig Eugene, on account of Capt C. A. Chalumeau, viz.: 107 mules and 4 asses, which, with the expenses, &c. amounted to \$795.50; which cargo remained on board on account of the above mentioned captain. Signed, Monte Video, the 3d June, 1820. The defendants also offered in evidence the following order for insurance, whereon the said policy was founded. "Baltimore, 23d May, 1820. Gentlemen,—Insurance is wanted for account of the concerned, at and from Rio de la Plata to Havana, with Liberty of Martinico, on the cargo of the brig Eugene, Charles A. Chalumeau, master, valued at \$6,000. Said brig will sail from La Plata in the course of this month. What will be the premium? J. B. A. Allegre." "5 p. c." "Agreed, J. B. A. Allegre."

The defendants then prayed the Court to direct the jury, that misrepresentation in a material fact, whether from fraud, mistake or negligence, equally vitiates the contract, whether it be that of the insured, or his agents; that every representation respecting the time of the sailing of the ship is in law material; that the representation to the Maryland Insurance Company is positive that the ship will sail in May; and the plaintiff's intestate, having himself shown, that she did not sail till the 12th of July following; if the jury shall be of opinion that the danger of the voyage was increased by that circumstance in any degree, however small, and that the disclosure of that circumstance to the defendants was of a nature to have influenced their judgment in any degree, however small, either in taking, or declining the risk, or in enhancing the premium to however small an amount, this misrepresentation was a material one, which avoids the contract of insurance, and the plaintiffs are not entitled to recover on that policy; and the law is the same, although this misrepresentation on the part of the plaintiff's intestate might have been

innocently made by *him, in ignorance of the true state of the facts, that then the plaintiffs are not entitled to recover. **140** Which opinion and direction the Court, [HANSON, A. J.] refused to give, unless the risk was materially increased by the vessel not sailing at the time represented; and with this qualification, gave the direction prayed for. The plaintiffs and defendants both excepted.

2. The defendants then called a witness, who stated that he was a merchant of long standing, and had been a member of some one of the insurance offices in Baltimore from their first establishment; and asked him whether, according to the usage and custom of insurance companies, the above order for insurance would be considered as covering live stock? To which question the plaintiffs objected. But the Court overruled such objection, and permitted the question to be asked. The plaintiffs excepted.

3. The plaintiffs then offered in evidence, that mules and jackasses, in 1820, and for many years before, were a common article of commerce and export from the river La Plata. That they were, during the times aforesaid, the chief articles of commerce between the river La Plata and Martinico; and that there was a trade in mules in 1820, from La Plata to the West Indies generally. The witness stated, that he knew nothing of the commerce in mules between La Plata and Havana particularly, except from his personal knowledge, which is confined to the following cases: He was at the river La Plata in March, 1820, and saw a vessel sail from that river loaded with mules, and saw her afterwards arrive at Havana—it was the British brig Palmyra. He believes her tonnage to be about 220 to 230 tons. She sailed with 170 to 180 mules, and arrived with only 33 alive, 4 or 5 of which died after she arrived. He saw another vessel, an American vessel, sail from the river La Plata with 180 or 190 mules bound for Havana. The witness understood her destination from her captain. The witness understood that he afterwards put into Charleston in distress, and never arrived at Havana. The mules on *board the Palmyra were stowed in two rows on the upper **141** and lower decks. Enseanado, on the river La Plata, is the principal port for exporting mules. All mules from Buenos Ayres are embarked at Enseanado. More vessels, while the witness was at Enseanado, loaded with jerked beef and tallow, than mules; but the vessels for the West Indies loaded principally with mules. The witness was at Enseanado and Buenos Ayres, from March to July, 1820. The plaintiffs also offered in evidence, by another witness, that he was in the river La Plata in 1822, and that he understood that there was a trade in mules from the river La Plata to the West Indies generally, and principally to the Windward Islands; but has no knowledge of such a trade to Havana particularly. He, himself, carried a cargo of jerked beef from Monte Video to Havana. He knows of no instance of a cargo of mules from the river La Plata to Havana. But there might have been vessels loaded at Enseanado,

about 18 miles below Buenos Ayres, which is the principal mule port on the river La Plata. The witness was not at Enseñado. They also offered in evidence, that mules sold in Martinico at \$120, and that mules from the Maine sold at Jamaica at from \$75 to \$160—averaging \$130, previously to the introduction of steam mills. That the mules from the Maine are much smaller than those from the river La Plata.

The defendants then offered to prove, by the testimony of William Patterson, who had been engaged in trade and commerce as a merchant in the City of Baltimore, and also as a director in one of the insurance companies established there, that a general policy on cargo does not embrace a cargo of live stock, or animals, according to the mercantile understanding and interpretation of such a policy in the City of Baltimore, and that when live stock or animals are meant to be insured, they are always insured by name, and that a much higher premium is asked than for an ordinary cargo of merchandise. The insurers consider a cargo of live stock more dangerous than an ordinary dead cargo, and * would charge a higher
142 premium for the former, than the latter. And upon looking at the order for insurance in the present case, he said that he would not consider it as an application to insure live stock or mules; and he believes it would be the general mercantile understanding of the construction of such order, that it did not embrace a cargo of live animals. They also offered to prove by Daniel Howland, another witness, who had been president of an insurance company, and a director for more than twenty years, and a commander of a vessel for many years previous, that there is a difference between ordinary cargoes and those of live stock or mules, in the price of transportation, and that the latter are considered the most dangerous. The insurers would make a difference in the premium they would ask, for the insuring the one or the other of such cargoes. He also proved that in his own opinion the order in this case would be considered, as intended to cover only ordinary cargoes, and not live stock or animals; and that he believed such would be the understanding and usage of underwriters, and others engaged in insurance, of the sense and meaning of the terms used in the said order. They further offered to prove by David Winchester, another witness, who had been a president and director of an insurance company in Baltimore upwards of 25 years, that the order of insurance in this case would not, in the judgment of underwriters, and others engaged in effecting insurances, be considered as covering a cargo of live stock or mules. That the words therein used, have acquired an appropriate sense between insurer and assured, by which they are understood to apply to a cargo not attended with any extraordinary perils, and are not understood to apply to live stock or mules; and that the premium which would be asked for insuring a cargo of mules would be higher than for insuring an ordinary dead or inanimate cargo. They also

offered to prove by Hugh Birkhead, a director of one of the insurance companies in Baltimore, that the order for insurance in this case, according to the general understanding among insurers, and others, * in Baltimore, would not be considered as an offer to insure mules and jackasses; that the difference between **143** a cargo of live stock and dead goods is so great that he should consider it the duty of the insured to state the fact that live stock was intended to be covered, in order to put the insurer and insured on an equal footing; and that the difference of premium on the insurance of those two kinds of cargo was considerable. They also offered to prove by Henry Thompson, long a director in an insurance company in Baltimore, and extensively engaged in commerce, that live stock is always considered by underwriters as a more dangerous cargo than dead goods; and the premium of insurance is much higher for insuring live stock, than dead cargo; and that such an order would not, in his opinion, be considered as an order for live stock. That according to the usage of merchants and insurers, the danger of a vessel, in the transportation of mules and live stock, is greater than that of a vessel employed in carrying a cargo of dead goods; and that the premium would be enhanced on a vessel carrying mules and jackasses; which fact the defendants also proved by the testimony of the said Daniel Howland, David Winchester, and William Patterson.

The plaintiffs then offered in evidence, by competent witnesses, long acquainted with insurance business, and with the usages of trade and mercantile understanding in matters of commerce, that there was no usage of trade or mercantile understanding which excluded mules and jackasses from the general term of cargo, used in an order for insurance, or otherwise; and that there was no usage of trade or general mercantile understanding in Baltimore, or general understanding among the insurers in Baltimore, by which live stock, or mules and jackasses, would not be considered as covered by a general insurance on cargo. They also offered in evidence, that the term cargo in the aforesaid order for insurance, would according to the mercantile understanding and usage of trade, among the insurers and merchants of Baltimore, be considered as covering * mules and jackasses. They further offered in evidence, **144** that a cargo of mules and jackasses is not a more hazardous cargo for insurance than any common cargo; and that a cargo of mules does not increase the risk of the vessel.

The plaintiffs then prayed the Court to direct the jury—1st. That if the jury find from the evidence that in the year 1820, and for some years before, mules and jackasses were well known articles of exportation from Rio de la Plata, and that cargoes of them were about that time usually exported, and had been for some years before, usually exported from that river, then the omission of the said Allegre to state to the underwriters, before or at the time of making the said

insurance, that the said cargo was to be a cargo of mules and jackasses, is not such a concealment as will vitiate the policy, on which this suit is brought; unless the jury shall find from the evidence, that according to the known and established usage of trade in the City of Baltimore, the order in question was construed and understood not to comprehend mules and jackasses in the cargo therein mentioned. 2d. If the jury find from the evidence, that mules and jackasses, in the year 1820, and for several years before, were usual articles of exportation from Rio de la Plata to Martinico, then the omission of the said Allegre to represent to the underwriters that the cargo mentioned in the said order for insurance, was a cargo of mules and jackasses, is not such a concealment as will vitiate the said policy; unless the jury find from the evidence, that according to mercantile usage and understanding in the City of Baltimore, the word cargo in the said order did not comprehend mules and jackasses. Which directions, each of them, the Court [HANSON, A. J.] refused to give; but gave the following opinion and direction to the jury: An usage of trade must be definite, uniform, certain, sufficiently long established, and so generally known, as to warrant the conclusion that the parties contracted in reference to it. This is necessary, in order to be obligatory on either party. First—There

145 is no usage * proved that the word cargo necessarily, in mercantile understanding, either excludes live stock, or that it includes it; nor of an usage that a greater premium would be charged on an insurance on mules, than on a dead cargo. Secondly. There is no evidence of an usage in trade of mules from the river La Plata to Havana. There is evidence that the only trade from La Plata to Martinique is in live stock; and if the voyage insured was from that river to Martinique, and no further, the policy would be good—the underwriters being bound to know the trade as one of an established usage. But the terminus of the voyage was the Havana; and no usage of trade in mules to that place from the river La Plata being proved, the underwriters were not bound to know it, from the circumstances of liberty to Martinique being stipulated in the policy, and consequently, not bound to inquire about the specific nature of the cargo. The insured, therefore, was guilty of a concealment fatal to the policy, provided the jury believe, that the risk was materially increased by the cargo being of mules, instead of a dead cargo. We say materially, because if all of a cargo was a dead one, yet from the different qualities of articles of commerce, one commodity must be, in some degree, always more hazardous than another. A cargo of buoyant articles would not abstract the attention of the crew in a storm from the navigation of the vessel, whereas the necessity of throwing over a heavy cargo, for the purpose of lightening the vessel, might; but such a slight difference in the risk would not vitiate the policy; because contracts of insurance, being contracts of indemnity, are to be construed liberally, in order

to get at the true equitable intentions of the parties, and are not to be settled according to the very letter of the contract, and rendered void because the cargo shipped was different from the one appearing on the face of the policy, technically construed, provided all things were done in good faith, and the situation of the parties not essentially changed, by a cargo being mules, instead of a dead cargo, even if no usage of such trade existed; unless the risk was thereby materially increased; and this is the only question open to the jury, which they must decide from the evidence they have heard at the bar. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Mayer, for the appellants. 1. There was no representation, either in a real or technical sense, that the vessel would sail in May. As the agent of the assured * and the underwriters stood, the agent could not be understood as stipulating that the vessel 147 would sail in May; he did not say he would warrant her doing so. A party may be so situated, that his language cannot be understood in a literal sense. *Hubbell vs. Glover*, 3 *Campb.* 313; *Bowden vs. Vaughan*, 10 *East*, 415; *Bryan vs. Featherstone*, 4 *Taunt.* 869; *Barber vs. Fletcher*, *Doug.* 306. A representation is never looked upon as a part of the policy, and does not affect it, except in cases of fraud. The insured need not prove the truth of all his representations; the underwriter must show that he has been deceived. *Philips on Insurance*, 84. 2. It is right that the contracts of parties should be affected by the usage of trade, because it applies to both, but that is not like suffering insurance companies to interpret their own contracts. 2 *Stark. Ev.* 448, 449, 450, 451. 3. It was sufficient for us to show that goods and merchandise include all articles of trade, and that mules and jackasses are articles of trade. The question is not as to the variance of the risk, because if that was material, then the least variance would be as fatal as the greatest. The prayer in the third exception, was on the ground that there was evidence of the usage of trade, and as there was evidence, it was for the jury to say whether the usage we contend for was proved. The usage attempted to be proved was, that mules and jackasses are included in the term cargo. The sense of terms may be enlarged in policies of insurance. 1 *Marshall*, 474, 475, 93, 323; *Philips on Insurance*, 66, 89. The only circumstances which the assured are bound to disclose, are those which may be supposed to be in his peculiar knowledge. When the offer for insurance is ambiguous, the underwriter is bound to ask an explanation; and if he does not, the construction most against him shall be adopted. *Livingston & Gilchrist vs. Maryland Insurance Company*, 7 *Cranch*, 535; *McLanahan vs. The Universal Insurance Company*, 1 *Peters S. O. R.* 187. There can be no concealment

except as to a collateral fact. *Philips on Insurance*, 80; *Boyd vs. Dubois*, 3 *Campb.* 133. It is not necessary to give information as to political events, or whether the articles are contraband of war. *Skidmore vs. Desdoity*, 2 *Johns. Cas.* 77; *Duguet vs. Rhinelander*, *Ib.* 476; *Seton & Co. vs. Low*, 1 *Johns. Cas.* 1; *Richardson et al. vs. Maine Insurance Company*, 6 *Mass. Rep.* 102; *Philips*, 89, 90, 102, 108. There is in this policy a memorandum of excepted articles, and therefore no other article is presumed to be excepted to. Insurance for whom it may concern, will cover all interests. *Buck & Hedrick vs. Chesapeake Insurance Company*, 1 *Peters S. C. R.* 151.

Meredith, for the appellee. The question is, whether the representation in this case is such as to be binding on the parties; its materiality has been decided by the jury. A representation is the affirmation or denial of a fact. *Philips*, 84. The order for insurance says, that the brig will sail from La Plata in the month of May. There is a distinction as to the representations made by the owner of the goods, and the owner of the ship. *Hubbard vs. Glover*, 3 *Campb.* 312. Representations which must be founded on expectation or calculation are not binding, but parties are held to the truth of positive statements. *Dennistown et al. vs. Lillie and al.* 3 *Bligh's P. R.* 202. A representation and a warranty differ in this, that the former does not affect the contract, unless it be of a material fact; but warranty, if false, destroys the contract. *Glover vs. Black*, 3 *Burr.* 1394; 1 *March*, 313. There are many articles properly termed goods, which are not comprehended under the general terms, goods, wares, and merchandise, in the policy. *Brough & Wetmore*, 4 *Term Rep.* 206; 1 *Marsh.* 320. Articles clearly included in the terms goods, are not covered by the policy, if exposed from their situation, to peculiar perils. 1 *Marsh.* 320; *Lennox vs. United Ins. Co.* 3 *Johns. Cas.* 178; 1 *Caines*, 44. Those articles which from their nature are subject to detriment or diminution in value, are not to be considered as insured against, unless the insurer knows of them. 3 *Kent's Com.* 247; *French Com. Code*, 213. A cargo of living animals must, necessarily, be in more danger than a dead cargo. *Woolcot et al. vs. Eagle Insurance Company*, 4 *Pick. Rep.* 429; 3 *Kent's Com.* 221; *Carson & Smith vs. Marine Ins. Co.* 2 *Wash. Cir. Court Rep.* 468.

* Evidence that mules, &c. with other articles, were exported generally from La Plata, cannot affect a particular policy of insurance. In this case but two instances are proved of shipments of such articles from La Plata to Havana, and these cannot establish a usage. 1 *Marsh.* 186. A liberty to touch does not justify trading at all events, if delay is created. *United States vs. Paul Shearman*, 1 *Peters' Cir. Court Rep.* 98; *Philips*, 18, 16; 1 *Marshall*, 186, 320; *Park*, 303, 304, 305; *Parker and others vs. Jones*, 13 *Mass. Rep.* 173.

Wirt, also for appellee. We insist on two propositions. 1. If there is in the record anything which is fatal to the plaintiff's recovery, errors by the Court below, in other respects, will not induce this Court to order a *procedendo*. *Turnpike Co. vs. Barnes*, 6 H. & J. 61. 2. The appellant cannot take advantage of errors, unless they be to his prejudice. The question in the first exception is as to the effect of the representation. The prayer of the defendant is, that there was a representation as to the time of sailing, and the Court say, that if the variance between the actual sailing of the vessel, and the time mentioned in the offer for insurance, materially increased the risk, then it avoided the policy.

The appellant contends that this was not a representation; but every positive statement as to the time of sailing, is a material representation. 1 *Marshall*, 463. And every material representation, either by the assured or his agent, which is not true, destroys the policy. 1 *Marshall*, 457, 454, 456; *Fitzherbert vs. Mather*, 1 Term Rep. 12; *Doug.* 247; 3 *Bligh's Par. Rep.* 202; 4 *Taunton*, 869; *Barber vs. Fletcher*, *Douglass*, 306; 2 *Stark.* 455; *Allegre vs. The Maryland Insurance Company*, 6 H. & J. 410, 411; 1 *Philips' Ev.* 490; *Phil. on Ins.* 18; 2 *Stark. Ev.* 452; *Woolcot et al. vs. Eagle Insurance Company*, 4 *Pick.* 433.

Taney, (Attorney-General,) in reply, referred to 1 *Marshall*, 444, 455, 93, note a; *Livingston vs. Ins. Co.* 7 *Cranch*, 536; *M'Lanahan vs. Ins. Co.* 1 *Peters*, 187; 2 *Stark. Ev.* 449, 453; *M'Gregor vs. Ins. Co.* 1 *Wash. C. C.* 39; *Cox's Dig.* 385, pl. 159; *Raborg vs. Bank*, 1 H. & G. 231; *Martin vs. Del. Ins. Co.* 2 *Wash. C. C.* 255; 3 *Kent Com.* 247; 11 *Petersdorf*, 377; *Boyd vs. Dubois*, 3 *Camp.* 133; *Buck vs. Ins. Co.* 1 *Peters*, 151; 2 *Johns. Cas.* 77; 3 *Camp.* 133; *Phil. on Ins.* 310.

*DORSEY, J. delivered the opinion of the Court. The first exception presents the question, does that part of the order for insurance, which speaks of the time of the sailing of the Eugene, amount to a representation? The inquiry is simply this: is Allegre to be understood as asserting a fact or expressing an expectation or belief, founded on facts of which he had knowledge? Give to this order a literal interpretation, and it may well be regarded as the assurance or statement of the fact, that the brig would sail sometime during the month of May. But instruments or contracts of this kind are to be liberally construed, and with reference not only to the situation and circumstances of the subject-matter of insurance, but also of the parties by whom the insurance is effected. There is nothing in the proof, presented by the record in this cause, to shew that the risk would have been increased by the departure of the vessel in July instead of May. Had it been so regarded by the underwriters, it is probable that the time of sailing would have formed one of the stipulations in the policy. In the absence then of any inducement to make a representation of such a character as that insisted on by

the appellees: when too, the distance of the port of departure from the place of insurance was so great as to render it most improbable, if not morally impossible, that the assured could know the precise time of sailing, would it not be more rational, more equitable, to regard the expressions of the insured, rather as the emphatic, confident statement of * a matter of opinion or calculation, than as
160 a representation in its technical sense. If this order for insurance under the circumstances in which it was drawn, will bear two interpretations, according to the case of *Livingston and Gilchrist vs. The Maryland Insurance Company*, 7 *Cranch*, 536, "the insurers ought to have asked an explanation and not substitute their own conjectures for an alleged representation." If the insurers, in this case, intended to exact a literal compliance with the statement of the time of sailing in the offer for insurance, they should have made it the subject of a warranty, or have informed Allegre that they relied on it as a representation. Had the statement been, that the vessel had sailed; and it were a fact of which its knowledge could be imputed to the insured, it might perhaps be regarded as a representation. But in this case a future event is spoken of, in its nature contingent, and of which the party speaking could not possibly possess any certain knowledge. As supporting the view here taken of this subject. *Phil. Ins.* 83, 84; *Christie vs. Secretan*, 8 *T. R.* 192; *Hubbard vs. Gover*, 3 *Campb.* 312; *Bowden vs. Vaughan*, 10 *East*, 415; *Brice vs. Featherstone*, 4 *Taunt.* 869. and *Jendivine vs. Slade*, 2 *Esp. R.* 572, may be referred to. Also the very strong case of *Rice and others vs. The New England Marine Ins. Com.* 4 *Pick. Rep.* 439, where Chief Justice Parker, in delivering the opinion of the Court, emphatically states: "We think that the statement of the day on which a vessel will sail, is substantially nothing more than stating an expectation that she will sail on that day." "The most positive intentions to sail on any future day, amount only to a strong expectation, for it must depend on the elements and other causes affecting the sailing of vessels, whether such intention shall be executed or not. And if the time of sailing be material to the risk, the insurer would be as likely to require a warranty, that the vessel would sail or had sailed on the day proposed, if it were stated positively, as if stated only as an expectation."

* In opposition to the above references must perhaps be re-
161 garded the case of *Dennistown and others vs. Little and others*, recently decided on appeal to the House of Lords, and reported in 3 *Bligh*, 202. But of this case it may be said, that the grounds of the decision are unsatisfactory, and indistinctly stated: and that viewing it even in the light of conclusive authority in this case as to the question adjudicated, it is by no means decisive of the point now under consideration, as presented by the facts in this record. In that case the statement was, the *Brilliant* will sail on the first of May; the fact was that she had sailed on the 23d of April, preced-

ing, and was at that time a "missing vessel." The assured there appeared as owner as well of the vessel as of the cargo, both being covered under the same policy. And upon this last ground the Lord Chancellor mainly rests his opinion: and draws the distinction between the case before him, and that of *Bowden vs. Vaughan*, the decision in which he recognizes and sanctions. In the case before us, the policy was solely on the cargo; and the underwriters had no reason to presume, that the owner of the cargo had any interest in or control over the vessel. The question now to be settled, therefore stands unaffected by the decision in 3 *Bligh*.

The order for insurance as regards the time of sailing being deemed no representation, the instruction of the Court to the jury, in the appellant's first bill of exceptions, was wrong upon two grounds. First, because it was wholly immaterial to the issue in the cause whether the risk were materially increased or not, by the sailing of the brig at a different time from that stated in the order for insurance, such statement being no representation. Secondly, because the Court submitted it to the jury, to find the fact, that the risk had been materially increased, when no testimony whatever had been adduced on that subject, to warrant the jury in drawing such a conclusion.

To the opinion of the Court, in the appellant's second bill of exceptions, but little opposition was made in the argument, *and to the admissibility of the testimony there offered, we **162** are aware of no well founded objection.

We concur with the County Court in their refusal of the prayers of the appellants, set forth in their third bill of exceptions. If proof of facts were requisite to demonstrate the far greater perils, to which a live cargo is exposed in a sea voyage than a dead cargo; the result of the adventure in controversy, and the testimony given in this cause, are most conclusive; 106 mules and 4 jackasses were shipped on board the Eugene. By tempestuous weather, which to a dead cargo would have occasioned no injury, 94 mules and all the jackasses were destroyed. On board the British brig Palmyra, 170 or 180 mules were laden, on a voyage from La Plata to Havana; on her arrival at the port of destination, but 33 were alive; 4 or 5 of which soon afterwards died; a common cargo exposed to such perils would in all probability have escaped uninjured. In transporting a cargo of live stock, a great portion of it is stowed upon deck, and consequently subjected to casualties, from which a cargo under hatches is wholly exempt. Indeed so much greater are the estimated risks to goods on deck, than to those in the hold, that double the premium of insurance is demanded for the former, that there is for the latter: and on account of this great diversity in the amount of premium, a policy, on "cargo," or "goods and merchandise," will not cover articles which are stowed upon deck. If the vessel be wrecked or stranded, the chance of saving a dead cargo, is far greater than that

of saving a live cargo. In fact, the disadvantage to the assurer attendant on the latter risk, which are not incident to the former, are so numerous and obvious that they need not be enumerated. In compacts then of which good faith and fair dealing are the very essence; where it is said to be the duty of the assured to communicate "every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it," * ought not the insured to be informed of it, where

163 live stock are the subject of insurance? There is no rule of law or decision of any Court of this State or elsewhere, as far as our researches have extended, which excuses the insured from making such a communication; commercial policy enjoins it; justice demands it; as far as the testimony in this case goes, the usages of underwriters require it, and the highest judicial tribunal in a sister State, hath adjudged it to be indispensable. Should we then hesitate to adopt it? An uniformity of decision among the several States of the Union, on subjects of this nature, is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce us to sanction the principle established in one of the most enlightened and commercial States in the Union, that a policy on cargo, goods or merchandise, will not cover live stock. The adjudication alluded to, is reported in 4 *Pick. Rep.* 429. *Talcot Woolcot et al. vs. Eagle Insurance Company*. If it had been in proof that mules or live stock were the only articles of exportation from La Plata to Martinico and the Havana, this would give a new aspect to the case. It would not then be necessary for the insured to notify the insurer of the character of the cargo. That fact having already been made known to him from the nature of the trade, of which the law presumes him to have knowledge. These remarks are made, as applicable to the prayers of the appellants, and with reference to the general principles of the law of insurance, not upon the rights of the appellants resting upon any usage of trade prevailing in the City of Baltimore.

Having approved of the Court's refusal to grant the two instructions asked for in this third bill of exceptions, it remains to be considered whether there be any error in the opinion delivered by the Court, of which the appellants have cause to complain. That there is, to us appears obvious. The Court undertook to determine the question of fact, that the appellants were guilty of a concealment

164 fatal * to the policy, provided the jury believe that the risk was materially increased by the cargo being of mules, instead of a dead cargo, "and that this material increase of risk, was the only question open for the consideration of the jury." In doing so, they threw out of the case the testimony offered by the appellants, "that the term cargo, in the aforesaid order for insurance, would, ac-

cording to the mercantile understanding and usage of trade among the insurers, and merchants of Baltimore, be considered as covering mules and jackasses;" thus, in effect, determining a controverted matter of fact, of the truth of which contradictory evidence had been offered. If the facts had been left to the jury, as they ought to have been, and they had found that there did exist such a mercantile understanding and usage of trade in Baltimore, upon the whole evidence offered in the cause, it was competent for the jury to have rendered a verdict for the appellants, notwithstanding the shipment of mules materially increased the risk which would have been incident to a dead cargo.

We concur with the County Court in their opinion in the appellants' second bill of exceptions, but dissent from their opinions in the first and third exceptions.

Judgment reversed, and procedendo awarded.

THE CHESAPEAKE INSURANCE COMPANY *vs.* ALLEGRE'S Adm'rs.
June, 1830.

Where actions upon two policies of insurance for the same voyage, one upon the cargo, the other upon the vessel, were tried before the same jury at one time, proof that the word cargo, in the one policy, did not, according to the mercantile interpretation and usage of the place where the policies were effected; cover a shipment of mules, is not evidence that the other policy on the vessel is a nullity. A perilous cargo to the insurer does not necessarily, increase the perils of the ship-owner.

* It is true, as a general rule, that in an order for insurance upon a vessel, it is not necessary to state the nature or condition of the cargo designed to be transported. If the underwriters desire information upon that subject, it is for them to ask it. **165**

In such case, the underwriter is presumed to be acquainted with the ship-owner's rights. In the absence, therefore, of fraud, or evidence to vary the general rule, the payment of a loss under the policy, cannot be resisted upon the ground that a larger premium would have been required for the insurance of a vessel employed in transporting mules, than was stipulated to be paid under a contract which did not mention the nature of the cargo.

APPEAL from Baltimore County Court. This was an action of covenant on a policy of insurance brought by the appellees' intestate against the appellants. The declaration stated, that the policy was made on the 22d of April, 1820, between the then plaintiff and the defendants, whereby the plaintiff, as well for himself as for and on account of all and every other person or persons to whom the said did or might appertain, in part or in whole, did make insurance, lost or not lost, at and from Rio de la Plata to Havana, with liberty of touching at Martinique, \$5,000 upon the body, tackle, &c. of the brig called the Eugene, wherof was master for that voyage, Chalumeau,

&c. Beginning the adventure upon the said vessel, &c. at and from Rio de la Plata, and so should continue and endure until the said vessel be arrived at the said ports of Martinique and Havana, &c. The declaration, in the usual form, proceed to state the nature of the policy, and averred that at the time of making the policy, Charles A. Chalumeau was the owner of the said brig, and that the insurance was made by the plaintiff, in trust for the use and benefit of the said Chalumeau. That on the 1st of July, 1820, the said brig, being tight, staunch and strong, sailed from Rio de la Plata, on her intended voyage towards Martinique and Havana, and whilst so proceeding, on the 15th of July, in year aforesaid, on the high seas, the said brig was, by the perils and dangers of the seas, and by **166** * stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, damaged, &c. and the said brig thereby wholly lost to the said Chalumeau, &c. The death of the plaintiff was suggested, and his administrators, (the appellees) were made plaintiffs. The defendant pleaded *non infregit conventionem*, and issue was joined.

1. The plaintiff at the trial gave in evidence the policy of insurance upon which this action was brought, dated the 22d of April, 1820, whereby the defendants insured the plaintiff's intestate for the concerned, at and from Rio de la Plata to Havana, with liberty of touching at Martinique, \$5,000 upon the body, tackle, &c. of the brig called the Eugene, whereof was master for the voyage — Chalumeau, or whoever else should go master, &c. Beginning the adventure upon the said vessel, tackle, &c. at and from Rio de la Plata, and so should continue and endure until the said vessel be arrived at the ports aforesaid. The policy then proceeded in the form of that used in the case of the same plaintiffs against the Maryland Insurance Company, omitting the clause respecting the survey of the vessel. By a memorandum signed by the president, on the 8th of June, 1820, the defendants stated that they would consider the above insurance as made at and from Monte Video to Havana. The plaintiffs also gave in evidence, that at the time the said policy was effected, the vessel was in every respect seaworthy, and arrived in the River La Plata at Monte Video, and there commenced loading on board her a cargo of mules and jackasses on the 5th of June, 1820, and having taken the same on board, sailed from the River La Plata on the 12th of July, of that year, for Havana; and during the progress of the voyage, by storms and tempests, the said vessel was compelled by necessity to put into Rio de Janeiro, where the vessel was regularly surveyed and ascertained to be totally unworthy of repairs, and condemned and sold; and the assured, in due time, duly made an abandonment of the vessel insured in due form to the **167** * defendants. The plaintiffs further gave in evidence, that the said vessel was an American vessel, and belonged to Charles A. Chalumeau, for whose account the insurance was made; and they

read in evidence, by consent, the protest made and sworn to by the master, mate, and two of the seamen of the brig *Eugene*, before the Vice-Consul of the United States of America, for the port of Rio de Janeiro, on the 19th of August, 1820, detailing minutely all the particulars of the shipment of the cargo on board the vessel—her sailing on the voyage, and the loss sustained. The master at the same time requiring a regular survey to be made of the vessel, &c. The plaintiffs also read in evidence sundry depositions of witnesses, taken and returned under a commission issued for that purpose from Baltimore County Court, to certain persons, named as commissioners, at Rio de Janeiro. As the questions decided by the Court below, do not appear to depend upon this testimony, it is omitted. The plaintiffs also gave in evidence, that at the time of, and long before, and since this policy was effected, mules and jackasses were an ordinary article of merchandise, and were shipped in various directions as merchandise from the River La Plata. They further gave in evidence, by Henry Armstrong and James Bosley, the same witnesses who proved the foregoing facts, that to their knowledge, mules are an ordinary article of exportation from Rio de la Plata to Martinique, Santa Cruz, and other Windward Islands; but that they did not, within their own knowledge, know of mules being carried to Havana from the River La Plata—never having been at Havana. And also proved by the said witnesses, that they never knew of any other cargo being carried from the River La Plata to the West Indies, than jerked beef or mules.

The defendants then read in evidence, by consent of the plaintiffs, the following order for insurance, upon which the policy above mentioned was made: "Baltimore, April 22d, 1820. Gentlemen—Insurance is wanted for account * of the concerned, at and from Rio de la Plata to Havana, with liberty of tonching at Martinico, **168** on the brig *Eugene*, Chalumeau, master, valued at \$5,000. Said brig left the Capes, bound out, on the 12th of January last. It is therefore presumed that she will sail from Rio de la Plata in the course of the next month. What will be the premium? J. B. A. Allegre." "5 per cent." "Agreed, J. B. A. Allegre."

They also offered to read the following paper; "Baltimore, August 15th, 1820. Gentlemen—By a letter from Captain Chalumeau, of the brig *Eugene*, it is mentioned that she will sail on or about the 5th June, direct for Havana. I make you this declaration in order of altering the policy of insurance effected at your office in regard to the time of the sailing of the above vessel. J. B. A. Allegre." "Agreed." It was admitted that the last mentioned paper was carried to the office of the defendants about the time it bears date, by the said Allegre, in whose hand-writing it was admitted to be. That it was submitted to the board, and agreed to by them, and the word "agreed," entered thereon in his presence. To the admissibility of which paper in evidence the plaintiffs objected, and prayed

the opinion of the Court, that the said paper was not legal and proper evidence. But the Court, (HANSON, A. J.) was of opinion that the said paper was admissible, and permitted it to be read to the jury, for the purpose of showing whether the said Allegre made the statement in the order of insurance as to the sailing of the said vessel, concerning his actual knowledge as to the time of said sailing, but not for the purpose of showing a change of the original contract between the parties. The plaintiff excepted.

2. The plaintiffs and defendants then offered in evidence that which is stated to have been offered by them in the third bill of exceptions, taken in the before mentioned case of the same plaintiffs against the Maryland Insurance Company; (see *ante*, 140,) and the plaintiffs made the same prayers to the Court, and their direction to the jury, in this case, as they made in the above mentioned case.

Which * directions, and each of them, the Court refused to
169 give. The plaintiffs excepted.

3. The defendants then prayed the Court to direct the jury, that if they find from the evidence, that according to the usage and mercantile understanding among underwriters and insurance companies in Baltimore, where both plaintiffs and defendants resided, a general order for insurance on a vessel is not considered as comprehending a vessel employed in transporting live stock or animals, and that a larger premium is always required by insurers, when an insurance is effected on a vessel that is intended to be employed in transporting a cargo of live stock or animals, than an ordinary cargo of dead merchandise, then the plaintiffs are not entitled to recover in this cause, as the order for the insurance, on which the policy is founded, does not comprehend, according to the mercantile usage and understanding of the same, a vessel employed in transporting a cargo of mules and jackasses. Which direction the Court refused to give; but delivered the same opinion and instructions to the jury, as were given by the Court on the prayers of the plaintiffs in the third bill of exceptions taken in the case preceding, (*ante* 136) of the same plaintiffs against the Maryland Insurance Company. The defendants excepted.

4. The defendants then prayed the Court to direct the jury, that if they find from the evidence given, that a larger premium would have been required by the defendants for an insurance of a vessel to be employed in transporting a cargo of mules and jackasses on the voyage insured, than was stipulated to be paid by the policy in this case, then the risk is materially increased, and the plaintiffs are not entitled to recover. Which direction the Court refused to give. The defendants excepted; and the verdict and judgment being against them, they appealed to the Court of Appeals.

This case was argued before BUCHANAN, C. J., ARCHER, and DORSEY, JJ.

* *Meredith*, for the appellants. This question is to be treated as a question of concealment. It was the duty of the assured to disclose, that the vessel was to be engaged in the transportation of live stock. *Park on Ins.* 287; *Carter vs. Bæhm*, 3 Burr. 1905; *Harrison's Index*, 738; 1 *Marshall*, 471; 1 *Dow*, 324. **170**

Taney, (Attorney-General,) and *Mayer*, for the appellees. No attempt was ever before made, to compel the assured to make known the nature of the cargo which was to go in his ship. If he is bound in any case, he is bound in all cases, and this cannot be contended. *Philips on Insurance*, 92; 2 *Wash. Cir. Court Rep.* 255.

Wirt, for the appellant, in reply, cited * *Marshall*, 471, 467, (note;) *Harrison's Index*, 738; 1 *Doug.* 97. **171**

DORSEY, J. delivered the opinion of the Court. With the questions decided by the Court below, on the appellees' bills of exception, this Court have no concern. Their duty is confined to an examination of the points determined against the appellants, and for the revision of which their exceptions were taken. It is apparent from the records, that the two cases of *Allegre's Administrators vs. The Maryland Insurance Company*, (ante 136) and *The Chesapeake Insurance Company vs. Allegre's Administrators*, were both tried in the County Court at the same time, and before the same jury. Without adverting to this circumstance, it would be difficult to account for the introduction of much of the evidence embraced in the bills of exceptions; in the latter case, it being wholly irrelevant to the issue for trial before the jury. The instructions, therefore, which were prayed for by the appellants, must be predicated only on that portion of the testimony which is applicable to the issue in this cause. The proof, then, of mercantile interpretation, or universal understanding amongst insurance companies and underwriters in the City of Baltimore, that the order for insurance of the cargo of the *Eugene*, or goods and merchandise on board of her, would not cover mules or live stock, is not evidence to prove that the policy on the brig is a nullity, because the underwriters were not apprised that she was to be employed in the transportation of mules. A perilous cargo to the insurer, does not necessarily increase the perils of the ship owner. No testimony had been adduced to show, that in the City of Baltimore, the order now in question would not sustain a policy in the mule trade. The Court, therefore, were right in refusing to instruct the jury, (as required by the appellants in their first bill of exceptions) "that if they find, from the evidence, that according to the usage and mercantile understanding among * underwriters and insurance companies in Baltimore, where both plaintiffs and defendants resided, a general order for insurance on a vessel, is not considered as comprehending a vessel employed in transporting live stock, or animals," &c. that the plaintiffs were not entitled to recover. To have granted such an instruction, would have been to have authorized the jury to **172**

find a fact, of which no testimony legally sufficient to warrant such a finding, had been submitted to their consideration. The refusal of the Court below being sustained, and their opinion conceding to the appellants more than they had a right to demand, the first exception furnishes no ground for reversing the judgment.

In rejecting the application of the appellants, as stated in their second bill of exceptions, the County Court were also right. As a general rule, it is true that it is not the duty of him who seeks insurance on his vessel, to state to the underwriters the nature or condition of the cargo which he designs to transport. If they desire information on the subject, it is for them to ask it. It would be carrying the doctrine of concealment far beyond its present limits, if, in a case like the present, where granting the instruction assumes as facts established before the jury, (the plaintiffs below having offered evidence to that effect) "that a cargo of mules does not increase the risk of the vessel;" that mules are the known and only article of trade between La Plata and Havana, except jerked beef, the Court should determine, that, if knowing that a cargo of mules were to be laden on board the brig, the insurers would have demanded a higher premium, then the policy is void; although it might be, that the premium received were double that which would have been required on an insurance on beef, and was an averaged premium, upon a fair calculation, of the probabilities of the nature of the cargo, derived from a knowledge of the trade, with which the underwriters are presumed to be acquainted. No imputation of fraud has been cast upon the assured, or him whose interests he represented. The instruction sought, is not predicated on that basis. *Judgment affirmed.*

173 * CHARLES GWYNN *vs.* JONES' Lessee.—June, 1830.

By the Act of 1766, ch. 14, sec. 2, conveyances to pass an estate in lands for above 7 years, are required to be enrolled within six months from their date. The enrolling officer is directed immediately, upon the receipt of any such deed, to endorse thereon the time of his receiving it—to enrol it, and, "on the back of every such deed, in a full legible hand, make a certificate of such enrolment, and the time of making it." An original deed of that character, cannot be read as evidence of title, without offering proof of the hand-writing of the officer who endorsed it.

The common law restrains the assignment of an entry for a condition broken, where, after the forfeiture incurred, the estate may continue; but it allows it where the violation of the condition puts an end to the estate of the particular tenant.

It is a case of constant occurrence, where a grantor, having a right of entry on land, conveys it to another, and therewith, necessarily, the power to maintain an ejectment for it. (a)

(a) Cited in *Cresap vs. Hutson*, 9 Gill, 277.

Mere continuance in a possession, which originated under a lease from the Lord Proprietary of this State, created in conformity to the Act of 1704, ch. 16, sec. 5, after the reversioner is entitled to re-enter for a condition broken, and before the original term had expired by lapse of time, is not adverse to the reversioner's right to re-enter, nor will limitation begin to run under such circumstances.

Where a possession commenced rightfully, and with the consent of the owner, nothing is to be presumed to make it adverse. Mere holding over, after the term ended, is not evidence of an adverse possession; and the possessor will be regarded as the tenant at will of the landlord, unless he can show that, since the expiration of the lease, he has held forcibly, or has acquired a title paramount to that under which possession was originally taken. (b)

APPEAL from Harford County Court. This was an action of ejectment, brought by the appellee (the plaintiff in the Court below) against the appellant, (the defendant in that Court) for a tract of land called Expectation. The defendant pleaded not guilty, and took defence on a warrant. Plots were made and returned.

1. At the trial, the plaintiff proved to the jury, that one James Norris was seized in fee of the tract of land called Expectation, in the declaration mentioned, on the 9th of June, 1774, and also gave in evidence the following writ of *ad quod damnum*, the inquisition, and return thereon, with * the lease of that date thereon, made to one Thomas Saunders, which said lease, and other proceed- **174**
ings, under the *ad quod damnum* aforesaid, were regularly attested, under seal, and are as follows: "*Maryland, ss. Frederick*, absolute lord and Proprietary of the Provinces of Maryland and Avalon, lord baron of Baltimore, &c. To the sheriff of Baltimore County, greeting: We command you, that by the oaths of twelve honest and lawful men of the county, by whom the truth of the matter may be better known, you diligently inquire if it be to the damage of us, or others, if we grant unto Thomas Saunders, of Baltimore County, twenty acres of land, lying on a run of water called Winter's Run, in Baltimore County, aforesaid, viz: ten acres on one side of such run, and ten acres on the other side of such run of water, together with liberty to take, fall, cut down and carry away, either by land or water, any wood or timber fit to build a mill, other than timber fit to split into clap-boards, upon any the lands next adjoining to the said twenty acres of land lying on each side of said run of water, at Winter's Run aforesaid, in the county aforesaid: and if it be to the damage and prejudice of us, or others, then to what damage and prejudice of us, and to what damage and prejudice of others, and of whom, and in what manner. and how, and of what value they are, by the year, according to the true value thereof, now before any other improve-

(b) Cited in *Hoye vs. Swan*, 5 Md. 252; *Armstrong vs. Ristean*, *Ibid*, 279; *Colvin vs. Warford*, 20 Md. 396; *Dean vs. Brown*, 23 Md. 16; *Campbell vs. Shipley*, 41 Md. 97; *Myers vs. Silljacks*, 58 Md. 328.

ment of the said twenty acres of land; and who are the present possessors of the said twenty acres of land, and what lands and premises remain to the present possessors over the said twenty acres; and if the said land, remaining to the present possessors, over the said twenty acres, will suffice to uphold their manor, viz: the sixth part of their manor, allotted them by the conditions of plantations, for the demise, before the alienation, so as the county, by the alienation aforesaid, in default of the present possession, more than was wanted, not to be charged, and grieved, and the inquisition thereupon openly and distinctly made to us, in our Chancery, under the seal
175 * and the seals of them by whom it was made without delay, send. Witness our trusty and well beloved Horatio Sharpe, Esquire, Chancellor of our said Province, this 13th day of April, in the 13th year of our dominion, A. D. 1764. Rheverdy Gheselin, Reg. Cur. Can."

"Baltimore County, ss. This is to certify, that at the execution of a writ of *ad quod damnum*, the inquisition of which is hereto annexed, I have surveyed and laid out in the name of Thomas Saunders, of Baltimore County, on a run called Winter's Run, ten acres on one side, and ten acres on the other side of said run, beginning at a bounded red oak, standing on the west side of Winter's Run aforesaid. it being the third bounded tree of a tract of land called the Expectation, and running, &c. containing and laid out for twenty acres, more or less.
 WM. SMITH, D. S. H. C."

"This inquisition indented, and taken upon Winter's Run, descending into Bush River, in Baltimore County, this second day of July, in the year of our Lord, seventeen hundred and sixty-four, before me, Aquila Hall, high sheriff of the same county, by the oaths of James Maxwell, &c. twelve honest and lawful men of the county aforesaid who being sworn by virtue of the writ hereunto annexed, to inquire into the exigency thereof, upon their oaths do say: that if the right honorable the Lord Proprietary grant unto Thomas Saunders, of Baltimore County, twenty acres of land, lying on the said Winter's Run, descending into Bush River, as aforesaid, viz: 10 acres on each side of the said run, bounded according to the metes and bounds mentioned in the certificate of survey hereunto prefixed, made by William Smith, surveyor of the county, as may be most convenient for the building a water mill at the place above mentioned, in Baltimore County aforesaid, it would not be to the damage of the honorable the Lord Proprietary, as being no manor; and that the said 20 acres of land, is of the yearly value of one pound sixteen shillings, current
176 money, without further * improvement and no more; and that the said 20 acres of land is part of two tracts of land, viz: 10 acres, one moiety thereof lying on the west side of the aforesaid run, is part of a tract of land called the Expectation, and James Norris is the present possessor, and is thereby damaged the sum of fifteen pounds, and the yearly rent thereof, is eighteen shillings current

money, and the other 10 acres. the other moiety thereof, lying on the east side of the aforesaid run, is part of a tract of land called the — being the Glebe of Saint John's Parish; and the vestry of Saint John's Parish, aforesaid, are the present possessors, and they are thereby damaged the sum of £20 current money, and the yearly rent thereof, is eighteen shillings current money, and there still remains sufficient to each of the present possessors to uphold their manor, viz: one-sixth part thereof. In testimony whereof, as well the sheriff as the jurors aforesaid, have hereunto set our hands and seals, the day and year above written. Signed and sealed by the sheriff and jurors."

"Maryland, to wit: The right honorable Henry Harford, Esquire, lord and Proprietary of the Province of Maryland: Whereas, Thomas Saunders, of Baltimore County, hath purchased out of our Court of Chancery, within our said Province, our writ of *ad quod damnum*, directed to the sheriff of Baltimore County, commanding him, &c. (here the lease recited the writ:) And whereas the aforesaid sheriff at the instance and request of the aforesaid Thomas Saunders, did return into our said Court a certain inquisition, indented and taken before him in the county aforesaid, on the second day of July, in the year of our Lord 1764, by the oaths of twelve honest and lawful men of the county aforesaid, who upon their oath did say, &c. (here the lease recited the inquisition and return:) Now know ye, that we are contented and pleased to grant, and by these presents do demise, grant, and to farm, let unto the aforesaid Thomas Saunders, his heirs, executors and administrators, the aforesaid 20 acres of land, to build a water mill, together * with free egress and regress to the said water mill, either by land, through any man's land next 177 adjoining to the said 20 acres of land, or else by water, together with liberty to take, fall, cut down and carry away, either by land or water, any wood or timber fit to build a mill, other than timber fit to split into clap-boards, upon any of the lands next adjoining to the said 20 acres. To have and to hold the said 20 acres of land, and premises aforesaid, unto him, the said Thomas Saunders, his heirs, executors and administrators, from the date of the inquisition aforesaid, unto the full end and term of eighty years then next ensuing, to be complete and ended. Yielding and paying therefor, unto our heirs and successors, the same rents, fines and services, as are reserved due and payable unto us for the said 20 acres, and also yielding and paying the yearly rents in the above inquisition set forth. Witness, Richard Lee, President and Chancellor of our said Province of Maryland, this 9th day of June, in the third year of our dominion, 1774." True copy—Test, Ramsay Waters, Reg. Cur. Can.

And the plaintiff also gave in evidence, that Saunders then entered into possession of the lands in said lease described, as the same is located on the plots in this cause. That he afterwards built a mill thereon, which went into disuse in the year 1785. That the

said Thomas Saunders, on the 1st day of December, 1786, conveyed the land in the said lease described, unto John Lee Webster, who, upon the death of said Saunders, in the year 1792, took possession of the same and held it until his death. And that the said Webster, by his will, in 1795, devised the same unto his son, Isaac Lee Webster, who took possession thereof, and by him and his tenants, of whom the defendant is one, the same hath been held in possession to this time, and by the defendant for fifteen years before the institution of this suit.

Thereupon the defendant offered evidence that the said Thomas Saunders had, by actual enclosure, held the possession for several years before his death, of all the land * contained without **178** the location of his possession, as made on the plots in this cause; that part of the fences which formed the said enclosure and possession were shortly after his death moved to where they are now located on the plots in this cause, by the defendant, as his possession by indented lines, and as his defence in this case; that to this extent, possession by actual enclosures, has always since so remained; that the said John Lee Webster, and Isaac Lee Webster, his tenants, and the defendant as one of them, actually held and possessed all the land within the said enclosures of possession so located, for which defence is made in this action.

Whereupon the plaintiff further gave evidence to the jury, that the said James Norris, by his will in August, 1798, devised 100 acres of the land in the declaration mentioned, including the part so held by the defendant, to his son James Norris, in fee, who entered into, and possessed the same, except the part aforesaid located as the possession of the defendant, and the said Webster and Saunders; that the said last mentioned James Norris executed a deed (of which the following is an office copy,) to Josiah S. McComas, and the said Josiah S. McComas executed the deed following to Benjamin G. Jones, lessor of the plaintiff.

The deed from James Norris, the son, to Josiah S. McComas, was dated 9th July, 1807, and in consideration of the sum of £150, "granted, bargained, sold, aliened, enfeoffed, and confirmed unto him, the said Josiah, his heirs and assigns, part of a tract of land called Expectation, lying on the lower end of said tract, containing 100 acres, and all the estate, right, title, and interest whatever, of him, the said James Norris, both at law and in equity, to the said tract of land and premises, hereby bargained and sold, or meant, mentioned, or intended so to be, and every part and parcel thereof." This deed was duly acknowledged and recorded, as appeared from the certified copy, under the seal of the clerk of Harford County Court.

The deed from Josiah S. McComas to Benjamin G. * Jones, **179** was dated 21st February, 1818, and in consideration of the trusts reposed in him by a certain James Norris, and the payment of

one dollar, granted, bargained, sold, aliened, released and confirmed, unto the said B. G. J. and his heirs, the same land and interest as described in the preceding deed. This was an original deed. There was the usual certificate of acknowledgment before two of the justices of the peace, and it was in fact endorsed on the back as follows: "received and recorded the 21st day of February, 1818, in liber H. D. No. 1, folio 227, one of the land record books of Harford County Court, and examined by Henry Dorsey, Clerk." And also proved that the said McComas and Jones took possession under said deeds, respectively, of the land mentioned therein, except the part so as aforesaid mentioned, in the possession of the defendant. The defendant then prayed the opinion and direction of the Court, to the jury, that if they believed the matters so given in evidence, that then the length of possession so holden by the defendant, and those under whom he claims, doth in law bar the plaintiff's recovery of the land, included within the lease to Saunders, being the land condemned as aforesaid; but the Court [ARCHER, C. J.] refused such opinion and direction. The defendant excepted.

The plaintiff then offered evidence, that in the year 1805, the said James Norris, the younger, being on the land so occupied by the said defendant, did enter thereon, and did demand of the defendant the surrender to him of the said land. And that the said defendant refused to surrender the possession of the same to the said Norris. Whereupon the defendant objected, that the entry and demand so made were insufficient to entitle the plaintiff to recover, and prayed the opinion of the Court, and their direction to the jury, that if such entry and demand be necessary in law, that the same ought to be made by the lessor of the plaintiff, after the deed of conveyance before mentioned made to him by said McComas, and before this action brought; but the *Court, [ARCHER, C. J.] refused such opinion and direction, and directed the jury, that the entry **180** and demand so made by the said James Norris, was a sufficient entry and demand. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, and MARTIN, JJ.

The following are extracts of so much of the two Acts of Assembly as were considered in this cause:

By the Act of 1704, ch. 16, sec. 5, it was enacted, that no person having, or that hereafter shall have obtained, any grant for any lands whereof such person or persons are not the real owners or possessors thereof, and whereupon he, she, or they have already built, or shall hereafter build a water mill, as the law hath before directed, shall have any right, title or claim, to any land granted for any time or term whatsoever, after such mill by him or them already built as aforesaid, or that shall hereafter be built, shall be casually broke, or

gone to decay as aforesaid, other than two years from the new erecting, building, finishing and repairing of such mill as aforesaid; but that in all and every case where any person or persons that have already built, or shall hereafter build, any water mill, which are, or that hereafter shall be broke, or gone to decay, as aforesaid, and shall not within two years after the publication hereof, or within two years after such mill shall become broke, or gone to decay as aforesaid, cause the same to be new builded, repaired and finished as aforesaid, it shall and may be lawful for the real owner or owners for such land, to such person or persons so granted as aforesaid, to re-enter upon the same; and in case such person or persons shall refuse, or deny to give the owner or owners of such land as aforesaid, peaceable and quiet possession thereof, such owner or owners shall, and **181** may recover his right to the same by ejectment, or otherwise * as the law directs; anything in this Act contained to the contrary notwithstanding.

By the Act of 1766, ch. 14, sec. 2, conveyances in order to pass lands, are directed to be enrolled in the records of the same county where the lands lie, or the Provincial Court, within six months after the date of such deed or conveyance; and the Clerk of the Court shall immediately, upon the receipt of such deed, endorse thereon the time of his receiving the same, and enroll the same, &c. And "shall on the back of every such deed or conveyance, in a full, legible hand, make a certificate of such enrollment, or the time of making it, and also of the folio of the book in which the same shall be enrolled, and shall to such certificate set his hand."

182 *R. W. Gill*, for the appellant, * cited the Act of 1704, ch. 16, sec. 5; *Duppa vs. Mayo*, 1 *Saund.* 413; *Ib.* 287, (a) note 16; *Hammond and Ridgely*, 6 *H. & J.* 245; 2 *Cruse Dig.* 553, sec. 28; *Runnington on Ejectment*, 60.

Flusser, for the appellee, cited, 1 *Plowden*, 363; 6 *Bac. Abr.* 383; *Coke Lit. sec.* 380; 1 *Bac. Ab.* 638; 2 *Blk. Com.* 155; *Coke Lit.* 203 (b), note (1) 7 *Com. Dig.* (d) 70; 17 *Viner placitum*, 1; 1 *Shep. Touch.* 152; 1 *Saund.* 213; 3 *Cruse Dig.* 549; 2 *Stark. Ev.* 507, 508; *Jackson Parker*, 3 *Johns. Cases*, 124; *Jackson vs. Thomas*, 16 *Johns.* 293; 1 *Cain. Rep.* 400.

EARLE, J. delivered the opinion of the Court. This case must be reversed, and returned to Harford County Court on a *procedendo*. The deed from McComas to Jones, is a link in the chain of the plaintiff's title, and the original was read without offering proof of the hand-writing of the clerk, who endorsed the time it was received into the office, which was indispensable to laying it before the jury.

183 The omission, it is likely, was not observed at * the trial, but as it is seen by us, and being a case before the Act of 1825, ch. 117, we must notice the error, and make it the ground of a reversal. 7 *H. & J.* 42.

As this case is to be tried again, and we have to act upon the bill of exceptions in the record, it becomes our duty briefly to assign our reasons for concurring in the opinions expressed by the Judge who signed it.

The lessor of the plaintiff claims the disputed land under James Norris, the elder, who was the undisputed owner of it in the year 1774, when it was granted to Thomas Saunders, by the Lord Proprietary, under the *ad quod damnum* law of 1704, ch. 16, for a term of 80 years, which from efflux of time, is not yet expired. The defendant claims under John Lee Webster, to whom Saunders assigned his lease in the year 1786. The mill erected thereon by Saunders went to decay, and was disused in 1785, and was not rebuilt in the year 1787, within two years thereafter, and by the terms of the law an estate for years granted by the Proprietary, then ceased, and the lease became null and void. This being the character of the condition of the lease broken, advantage of the breach may be taken without entry on common law principles, either by the original owner, or by the assignee of the reversion. *Vid. Duppa and Mayo, 1 Saund. 287.* The re-entry given by the Act of 1704, to the owner, was a summary remedy designed for his benefit, and does not alter in this respect the principles of the common law, which restrains the assignment of an entry for a condition broken, where, after the forfeiture incurred, the estate may continue, but allows it, where the violation of the condition puts an end to the estate of the particular tenant. But there was an entry in this case by James Norris, Jr. in the year 1805, and agreeably to the language of the Act of 1704, he might have supported an ejectment for the land, without further entry; and his grantee and those claiming under him, are surely in the same situation with himself, and may sue in ejectment, upon their right of entry. It is the case of a constant occurrence, where a grantor having a right of entry on land, conveys it to another, and therewith necessarily, the power to maintain an ejectment for it. 184

In the first part of the bill of exceptions, the defendant, the appellant, had prayed the direction of the Court to the jury, that if they believe all the matters given in evidence, that then the length of possession holden by the defendant and those under whom he claimed, doth in law bar the plaintiff's recovery of the land, included in the lease to Saunders; this direction the Court refused to give, and we think rightly. We cannot perceive anything in the facts of the case, that looks like a possession, adverse to the title of the plaintiff, until the year 1805, when on the demand of Norris, Jr. the possession was refused to be delivered to him by the defendant. When the land was enclosed by Saunders, he was confessedly the tenant of Norris, the elder, and it is natural to suppose fenced it in, that he might have the greater enjoyment of it. That the enclosures were kept up by Webster, and his tenants, with the same views, we must presume, where no attempt is made to prove an altered, and adverse inten-

tion. If no rent was paid, and the tenancy not expressly admitted, there is nothing to show that the possession was held in hostility to the rights of the landlord, and those claiming under him. In the absence of this proof nothing is to be presumed in favor of an adverse possession, and more particularly so, where it commenced rightfully, and with the consent of the owner. The mere holding over, after the term ended, is not evidence of an adverse possession, and the possessor will be regarded as the tenant at will of the landlord, unless he can shew that since the expiration of the lease, he has held forcibly, or has acquired a title, paramount to that under which the possession was originally taken. Something more than an intimation of hostility in such a case is necessary, and the possessor coming in under the assignee of the lease, as in this case must be supposed to hold his title.

Judgment reversed, and procedendo awarded.

185 * EDELEN'S Ex'rs *vs.* DENT'S Adm'rs.—June, 1830.

A testator directed the whole of his real and personal estate, not specifically devised, to be sold on credit by his executors, and the proceeds applied to the payment of his debts and legacies. At the time of making his will, and at his death, he was indebted to E. one of his pecuniary legatees, to whom he devised a greater sum than he owed. In an action by E. against the executors to recover the debt due to her from the testator, *held* that her legacy was not to be taken as a satisfaction of the debt due her.

The general rule of law that a pecuniary legacy, of an equal, or a larger amount, is to be taken as a satisfaction of a debt, is undeniable: but it is not an unbending rule, and not being much favored, is made to yield to slight circumstances.

An express devise for the payment of debts and legacies—the creation of a fund for the payment of debts, and a charge of the legacy on that fund—if the legacy be uncertain, and made to depend upon a contingency—if the payment of the legacy be postponed by the will to a time subsequent to that, at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time, are each cases in which a legacy will not be considered as a satisfaction of the testator's debt.

APPEAL from Prince George's County Court. This was an action of debt by the appellees, as administrators, *d. b. n.* of Elizabeth Dent, against the appellants, Joseph Edelen and Nicholas Stonestreet, as executors of James Edelen, on a single bill, signed by the appellant's testator, payable to the intestate of the appellee, for \$1,409.86, on demand, and dated on the 20th June, 1812. The defendants pleaded payment, on which issue was taken. The following statement of facts was submitted for the decision of the Court: "James Edelen, by his last will and testament, dated 29th August, 1813, which was duly proved and recorded in the office of Register of Wills of Prince

George's County, and which is as follows, to wit: 'In the name of God, Amen: I, James Edelen, of Prince George's County, &c. Item, I will and direct that my executors hereinafter named, shall pay and satisfy all my just debts. Item, I will, and devise, that all my land and real estate, consisting of the plantation on which I live, the one on * which Dixon now lives, and the one occupied by Joseph N. Stonestreet, shall go to my executors, to them, and their heirs, for the following purposes, to wit: to be by them sold, as soon as they can be, and the money arising from the sale of said land, shall be distributed among my legatees hereinafter named; and I also will and direct, that all my personal estate, not hereinafter particularly devised, shall be also sold by my executors, and the whole proceeds divided among my legatees hereinafter named. The whole money arising from the sales of real and personal property, to be distributed in the proportions hereinafter designated. And I direct that the real estate shall be sold upon a credit of six, twelve, and eighteen months, from the day of sale, and the personal property upon six months' credit, the purchasers giving bond with approved security, for the payment of their respective purchases. Item, I will and devise to my brother Joseph Edelen, the sum of \$6,000 to him for his life, that is, he shall receive the interest of the said money, and at his death to be equally divided amongst his children. I also give to my brother Joseph Edelen, my two-years-old sorrel colt, out of Floretta. Item, I give to my sister, Elizabeth Dent, the sum of \$2,500, and I direct that she shall pay the interest of said \$500 annually, to her son William Lewis Dent, and at his death shall divide it amongst his children. Item, I give to George W. Dent, the sum of \$250. I also give to my sister Elizabeth Dent, negro girl called Suck. Item, I give to my sister, Margaret Stonestreet, the sum of \$2,000: I also give to my sister Margaret Stonestreet, negro woman Harriet, and her children. Item, I give to my sister Sarah Pye, the sum of \$1,500. Item, I give to my sister Mary Stonestreet, the sum of \$500. Item, I give to my sister Mary Stonestreet, negro woman called Bettie Day, and her children, and also Bob, his wife, and three youngest children. Item, I give to my brother Samuel Edelen, my negro boy called Patrick, and I release to him the money he owes me. Item, I give to my niece Jane Diggs, negro woman Betty, and her four * children. I give to my niece Mary N. Stonestreet, negro girls Mary and Kitty, and negro boy Daniel. Item, I give to my nephew Joseph N. Stonestreet, the sum of \$500, and release and discharge him from his note,' and then after various other specific, and pecuniary bequests, the testator constitutes the appellants his executors, and bequests to the intestate of the appellee, the further sum of \$250. The several pecuniary bequests to the intestate of the appellees contained in the foregoing will, amounted to the sum of \$2,750, and at the time of his death it was admitted, that the appellant's testator owed to her, as evidenced by the single bill

upon which this action is brought, the sum of \$1,409.86, with interest from the 20th June, 1812. The will of the appellant's testator, was proved on the 8th of January, 1814—the money due by the single bill, was payable, before and at the time of the testator's death; and upon this statement the question is, whether, the debt due Elizabeth Dent, is satisfied by the legacy." It was agreed that the preceding statement should have the same effect as a special verdict, each party reserving the privilege of appealing. The County Court gave judgment on the case stated for the plaintiff, and the defendants appealed to the Court of Appeals.

The case came on to be tried before BUCHANAN, C. J., EARLE and ARCHER, J.J. and was submitted on notes.

Stonestreet, for the appellants.

R. Johnson, for the appellees, cited 2 *Mad. Ch.* 42; *Richardson vs. Greese*, 3 *Atk.* 65; *Matthews vs. Matthews*, 2 *Vez. Sen.* 636; 2 *Mad. Chan.* 42; *Chancey's Case*, 1 *P. Wms.* 408; *Richardson vs. Greese*, 3 *Atk.* 65; *Hinchliffe vs. Hinchliffe*, 3 *Ves.* 529; *Nicholls vs. Judson*, 2 *Atk.* 300; *Clarke vs. Sewell*, 3 *Atk.* 96; *Peacock vs. Falkener*, 1 *Bro. C. C.* 296.

191 * BUCHANAN, C. J. delivered the opinion of the Court. The question here is a very short one. James Edelen being indebted to his sister Elizabeth Dent on a single bill, which was due before, and at the time of his death, made his will after it had become due, in which he first directs that his executors shall pay and satisfy all his just debts. He then directs, that they shall sell the whole of his real estate and all his personal estate not specifically bequeathed; the personal property on a credit of six months, and the real estate on a credit of six, twelve, and eighteen months and that the whole of the proceeds shall be distributed among his legatees therein after named, in the proportions designated. To his sister Elizabeth Dent he bequeaths a sum of money exceeding in amount the debt due from him to her; and whether this pecuniary legacy shall be taken as a satisfaction of the debt, is the question submitted?

The general rule of law, that a pecuniary legacy, of an equal, or a larger amount, is to be taken as a satisfaction of a debt, is undeniable; but it is not an unbending rule, and not being much favored is made to yield to slight circumstances to be found in the will. Such as an express devise for the payment of debts and legacies, the creation of a fund for the payment of debts, and a charge of the legacies on that fund; or if the legacy be uncertain and made to
192 * depend upon a contingency; 2 *Mad. Ch.* 42, 43, 44; 3 *Atk.* 65; or if the payment of the legacy be postponed by the will to a time subsequent to that, at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be

not made payable immediately, but at some future time. 2 *Mad.* 44; 3 *Atk.* 96; 1 *Brown's Ch. Rep.* 295. In this case with the exception that the legacy is not made to depend upon a contingency, all those circumstances concur. The debt was subsisting and due before and at the time of the testator's death; there is an express devise for the payment of debts and legacies, the creation of a fund charged with the payment of debts and legacies, and the legacy to Elizabeth Dent is not made payable immediately on the death of the testator, but with the other legacies, is to be paid out of the proceeds of sales of the real and personal property, and might in part at least, not be paid until long after the executors by law were bound to pay the debts, the real property being directed to be sold, at a credit of six, twelve, and eighteen months from the time of sale.

There is moreover another circumstance presented by this will, which is worthy of consideration. It is this, that there is a specific bequest, to one of the objects of the testator's bounty, and a pecuniary legacy to another, to whom he expressly releases the debts respectively due by them to him; which tends to shew the general intention of the testator, that the different legacies bestowed should be enjoyed as clear bounties by those to whom they were given, unaffected by any debts, owing to, or by him, or them. We therefore think, that the pecuniary legacy to Elizabeth Dent, is not to be taken, as in satisfaction of the debt which was due to her by the testator.

Judgment affirmed.

* MUNDELL *vs.* HUGH and LLOYD PERRY.—June, 1830. 193

Where it does not appear, either from the plots themselves, or the surveyor's explanations, what was the object or design of certain lines upon plots returned under a warrant of resurvey, nor from the surveyor's certificate, that he had ever made such locations, it is not competent to shew, that the surveyor laid down such lines for a counter-location of a tract of land described in the plots; for such lines are a mere nullity.

If testimony, out of the plots and explanations filed with them, could be received to give name and character to unintelligible locations, it would defeat the object for which plots have been received as part of the pleadings in the cause.

The object and intention of introducing plots in the cause, is to give certainty to the claim and defence, and to apprise the parties, that the locations of other lands are to be used, to illustrate, and support, the location of those under which they claim title. It is to prevent surprise, and therefore it has been the uniform practice of the Courts, to reject evidence as to any object, unless it is located on the plots. (a)

(a) Approved in *Medley vs. Williams*, 7 G. & J. 68; *Crawford vs. Berry*, 11 G. & J. 313; *Clary vs. Kimmell*, 18 Md. 254; *Morris vs. Hammond*, 27 Md. 620; *Newman vs. Young*, 30 Md. 419. See Rev. Code, Art. 64, sec. 25.

The proprietor of adjacent tracts of land, conveyed the younger tract by metes, and bounds; all the land contained within those metes and bounds, passes to the grantee, although part of the elder tract is embraced in them. (b)

A deed of land executed in the year 1785, to be competent evidence, should appear to have been recorded, according to the provisions of the Act of 1715.

In trespass for breaking the plaintiff's close, and cutting down his trees, if the plaintiff fail to prove the cutting his trees, he may still recover for the breach of his close.

Prior to the Act of 1825, ch. 117, it was the duty of the Court to notice errors apparent on the face of the record, or any legal objections to evidence set out in the record, although they were not brought into the view of the Court below, nor formed any part of the bills of exceptions. (c)

Where the declaration charged that the defendant, the close of the plaintiff's called ———, situate, &c. broke and entered, and defence having been taken on warrant, and neither the warrant, nor any of the proceedings under it, gave any name to the close of plaintiff, the Court refused to affirm a judgment rendered for the plaintiff, prior to the Act of 1825, ch. 117, upon proceedings thus defective on their face.

APPEAL from Prince George's County Court. *Trespass quare clausum fregit*, instituted by the appellees, against the appellant, Thomas Mundell, on the 9th of April, 1818. The declaration charged 194 that the appellant * on the 1st of April, in the year 1817, and on divers days between that day, and the day of impe- trating the writ in this case; the close of the said Hugh and Lloyd, called ———, situate in the county aforesaid, broke, and entered, &c. and cut down the timber and other trees, &c." Pleas not guilty and *liberum tenementum*. A warrant of resurvey was issued, without the name of the land to be surveyed, and plots were made and returned.

1. At the trial the plaintiffs read in evidence the patent of a tract of land called "Marsham's Rest," containing 750 acres more or less, which was patented to one Richard Marsham on the 26th of May, 1664; and then offered proof that the plaintiffs were, at the time alleged in the declaration, or the time when the trespasses were alleged to have been committed, and for several years before, in possession of a part of said land called Marsham's Rest, and proved the commission of several trespasses, by the tenants of the defendants, in the *locus in quo*, designated on the plots in the cause by a line drawn from black D, to red D, to 1, and to black D.

The defendant then for the purpose of showing that the plaintiffs' location of Marsham's Rest, was not the true location thereof, but that if the said land was truly located, the acts alleged as trespasses proved, would not be found to have been committed within the lines of

(b) Approved in *Casey vs. Inloes*, 1 Gill, 510; *Bryan vs. Harvey*, 18 Md. 130. See *Hall vs. Gittings*, 2 H. & J. 98, note.

(c) See Rev. Code, Art. 71, sec. 7.

the said tract of land, but within the lines of a tract called Quicksale, which belonged formerly to the defendant, and offered to shew a location on the said plots, beginning at red A, the beginning of a tract of land called Taylorton, as so located on said plots, running with yellow shaded lines, around the plaintiff's said location of Marsham's Rest, by red D to said red A, as a counter-location of Marsham's Rest, and to produce evidence of the correctness of that location, which was objected to by the plaintiffs on the ground, that it did not appear on the plots, by whom that location had been made, or what land it was, that was thus located, and because there was not on the said plots any explanations of * the said alleged counter-location. Whereupon the defendant produced another plot, **195** formerly made in the cause, and proved by the clerk, that the plots filed in the cause had been delivered by him under the leave of the Court, to add and amend, to the sheriff of the county, for the purpose of making the amendment; and further proved by the surveyor, that he had received that plot from the sheriff, for the purpose of making the amendment, and that, instead of making the amendment, on that plot, he having been directed by the Court, to combine that plot and explanations with another, that had been made out for the plaintiffs, copied, as he supposed, every thing from that plot so made out for the defendant, and the other plot so made out for the plaintiffs, upon another paper, which is the amended plot in this cause, marked B, and intended to have put in the explanations on the new plot, an explanation of the said location, claimed as the defendant's said counter-location, of the said Marsham's Rest, as a location made by the defendant, and supposed he had done so, and that he had returned the said plot, on the first day of this term, and retained in his hands the other former plots, and now at the trial produced them in Court. Whereupon the defendant contended that he had a right to use the said counter-location of Marsham's Rest, as the same is located, and explained in the said defendant's former plot, in the trial before the jury. But the Court was of opinion, and so instructed the jury, that it was not competent for the defendant to use the said alleged counter-location of Marsham's Rest, and that the plaintiff's location thereof, was to be taken as uncontradicted by the defendant, in said cause, and as the true original location of said land. The defendant excepted.

2. The defendant thus, to prove title to the land located on the plots, as part of Quicksale, located as his freehold, read in evidence a patent for the tract of land called Quicksale, containing 400 acres, to Francis Street, dated 22d October, 1666, and the deed of Thomas Gantt, (under * whom the plaintiffs claim,) dated August 5th, **196** 1735, to Patrick Sim, under whom the defendant claimed, for a part of the tract called Quicksale, containing 90½ acres more or less, which said deed did not appear to have been recorded, and offered to prove that the said Thomas Gantt, was at the time of the

date of said deed, the owner and holder of the tract, called Marsham's Rest; but the Court were of opinion that the deed of the said Thomas Gantt, purporting to convey Quicksale by name, could not, under such circumstances, convey title to any land that lay within the lines of Marsham's Rest, the elder survey, even though said Gantt was at the time owner, and holder of both of the said tracts. The defendant excepted.

3. The Court then, upon the prayer of the plaintiffs, instructed the jury, that the plaintiffs in the event of their failing to prove the trespass by cutting trees, are entitled to recover for the breach of their close, if such fact is proved to the jury. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was submitted on notes, to BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Taney, (Attorney-General,) and *Mundell*, for the appellant, cited *Hawkins vs. Hanson*, 1 H. & McH. 523, and the cases there cited; *Benson vs. Musseter*, 7 H. & J. 208.

Stonestreet, for the appellees.

203 * MARTIN, J. delivered the opinion of the Court. An action of trespass for breaking, and entering the close of the plaintiffs, and cutting down their trees, produced the appeal, that now becomes a subject of examination in this Court. A warrant of resurvey was issued to the surveyor to locate such lands, as the parties deemed necessary, to explain their respective titles. Locations were made for both the plaintiffs and the defendant. But instead of placing their locations on one paper to give a distinct view of the whole, the surveyor returned one plot with the locations made for the plaintiffs, and a separate plot containing those made for the defendant. Under leave to add, and amend, he was directed by the Court, to place the locations he had made for the defendant, on the plot returned for the plaintiffs. Under the impression that these directions had been complied with, the plot letter B, was filed in the cause, and the plot originally returned for the defendant, was retained by the surveyor. The plaintiffs having located a tract of land called Marsham's Rest, and the alleged trespasses to be within the lines of that land, as thus located, the defendant offered to show a counter-location, of that tract as made by him, on the amended plot, beginning at red A, running to near red D, and round to the beginning at red A, and to produce evidence of the correctness of that location, which was objected to by the plaintiffs. On reference to the amended plot we find four lines are drawn with yellow shading, beginning at red A, running to red D, and round to the beginning at red A. But whether these lines are to represent the location of any land, and if any, what land, by whom it was made, or for what

purpose it was done, does not appear either by the location itself or any explanation on the face of the plot, or filed with the plot; * nor does the certificate of the surveyor state he ever made such a location. The defendant then attempted to aid the 204 defect by giving in evidence to the jury the plot originally laid out for him, on which Marsham's Rest was located, and which had been retained by the surveyor, and by the parol testimony of the clerk of the Court, and the surveyor, who stated in substance that the plot originally filed in the cause had been delivered to the surveyor, for the purpose of putting the locations made by the defendant, on the plot returned for the plaintiffs; that the surveyor under the impression that he had done so, returned the plot B, as the amended plot, which was filed in the cause, and the plot originally made out for the defendant was retained by him, which plot he produced in Court. This testimony was rejected by the Court, and presents the question arising upon the first bill of exceptions.

On the plot marked B, we find a parallelogram included within four lines shaded with yellow, but as before stated no name is given to the land, intended to be represented by that figure. It is not stated by whose direction it was made, nor for what purpose it was placed there, nor does the surveyor, in his certificate, say it was made by him. It is therefore a mere nullity. An imaginary location from which neither plaintiffs nor defendant could derive any information or advantage. Could the defendant clothe this nondescript with name, character, and legal effect, by the production of the other plot, and the parol evidence offered by him?

If testimony out of the plot and explanations filed with them, could be received, to give name, and character, to unintelligible locations, it would defeat the object for which plots have been received as part of the pleadings in the cause. If you can resort to such evidence to explain one tract, you may resort to it, to explain all. It would then only be necessary to place certain lines upon a piece of paper without name, without explanation, and without stating the purpose for which they were made, and file it * with the clerk. 205

What advantage would such an unmeaning paper be, to the parties? It would not enable them to ascertain the grounds upon which his opponent relied, nor to make counter-locations of the lands, if such counter-locations were deemed proper. The object and intention of introducing plots in the cause; is to give certainty to the claim and defence, and to apprise the parties, that the locations of other lands are to be used to illustrate, and support the location of those under which they claim title. It is to prevent surprise, and therefore it has been the uniform practice of Courts, to reject evidence as to any object, unless it is located on the plots. If a tract of land has been located by one party, and not counter-located by the other, the location is admitted to be correct. 3 H. & J. 13. But how is it possible, for a party to know whether a counter-location is

called for, until he is apprised that a location of the land is made? In the cause now before the Court, the plaintiffs located the tract of land called Marsham's Rest, and upon an examination of the plot and explanations, seeing no counter-location of that land, they had a right to conclude the location was admitted. Had the counter-locations been apparent by a proper explanation filed with the plot, they might have made further locations of that land to shew its true position and extent. But it is said this case stands upon different grounds. That the plot originally filed for the defendant, was still filed in the cause, and the plaintiffs might have resorted to it when they pleased. But what advantage or information could they derive from it? The locations on the two plots are entirely different, and no man, unless he possessed the spirit of divination, could know by an examination of these two plots, that the figure within the yellow shading, and red letters on the amended plot, was intended to represent Marsham's Rest, as located on the plot returned for the defendant. We therefore concur with the Court below in the opinion expressed in the first bill of exceptions.

206 * In the progress of the trial of this cause, the defendant offered in evidence to the jury, a deed from Thomas Gantt to Patrick Sim, (under whom he claimed title,) for part of a tract of land called Quicksale, and to prove that the said Gantt, was at the time of the date of the deed, the owner, and holder of the tract called Marsham's Rest. The deed states that the part of Quicksale, sold by the grantor, was contained within certain metes and bounds, particularly specified in the deed. Upon a location of these lands it appeared a part of the land contained within the metes and bounds, mentioned in the deed for Quicksale, was included within the lines of the elder tract, called Marsham's Rest. The Court were of opinion, (as appears by the second bill of exceptions) that the deed purporting to convey part of Quicksale by name, could convey no land but Quicksale. In this opinion we think they were decidedly wrong. Gantt, being the proprietor of both Marsham's Rest and Quicksale, if he conveyed the younger tract by metes and bounds, all the lands contained within those metes and bounds, would pass to the grantee, although part of the elder tract was embraced within them. Many decisions of this Court might be produced, to sustain this doctrine, and whether it depends upon the principle of carrying the intention of the parties into effect, or that a deed shall be taken most favorably for the grantee, the law is now too well established to be questioned. *Hackins vs. Hanson*, 1 H. & McH. 523; *Hall vs. Gittings*, 2 H. & J. 119.

It may not be improper however to remark that this deed, as it appears in the record, was not legal evidence to be given to the jury. It was executed on the 5th of August, 1735, and does not appear to have been recorded, according to the provisions of the Act of 1715. Whether the defendant might not have produced testimony to give

it legal effect, had he not been stopped by the Court, is not necessary for us to decide.

* The third exception appears to be abandoned by the appellant, but if relied on cannot avail him. We concur with the Court in this exception. **207**

The appeal in this case was entered in the year 1823, and therefore is not affected by the Act of 1825, ch. 117, and it is the duty of the Court to notice errors, apparent on the face of the record, or any legal objections to evidence set out in the record, although they were not brought into view in the Court below, nor formed any part of the bills of exceptions. *Speake vs. Sheppard*, 6 H. & J. 86. The declaration in this cause does not state the name of the land on which the trespasses are alleged to have been committed. That still remains in ———. The warrant of resurvey is open to the same objection. The surveyor is directed to lay down all that plantable land, called ———, and when we examine this supposed amended plot, we think we hazard nothing in saying, a more defective one never was presented in a Court of justice. Having placed the locations of several tracts of land upon the plot, an explanation is made to some of them, and to others no possible clue is given, by which you can ascertain either the name of the land located, the party by whom, nor the object for which it was located. Some of the locations appear to be merely imaginary lines, drawn without any authority, and without any meaning. Nor is it in a better situation when we look at the certificate of the person who returned this amended plot. It professes to have been made by virtue of a warrant of resurvey to lay down all that plantable land called ———, without naming it. Nor can this blank be supplied, by either the warrant of survey, or the declaration filed in the cause. The same ——— is to be found in all. The certificate to the plaintiff's location then states, "I hereby certify, as surveyor of the county aforesaid, that I have in the presence of the sheriff of said county, carefully resurveyed, and laid down the tracts of parcels of land above explained, &c." To this certificate two seals are annexed, but neither * the name of the sheriff nor surveyor appears to the certificate. The certificate to the locations, made by the directions of the defendant, is still more defective. That does not state by whom the survey was made, or that it was made in the presence of the sheriff. It is subject to the same objections as to blanks with the certificate to the locations made for the plaintiffs. It is not signed by either the sheriff or the surveyor. This Court cannot affirm a judgment so fatally defective on the face of the proceedings. **208**

Judgment reversed, and procedendo awarded.

PENNINGTON, Adm'r of PATTERSON *vs.* GITTINGS, Ex'r.—June, 1830.

The answer of an executor or administrator in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule, that an answer asserting a fact responsive to the bill can only be disproved or outweighed by the testimony of two witnesses, or one, with pregnant circumstances. (a)

When an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions, and his speaking positively cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. (b)

The gift by a father to his child of a certificate, that the father is entitled to a certain number of shares in the capital stock in a bank "transferable at the said bank only, personally, or by attorney," signed by the cashier of the bank, and endorsed in blank by the father will not sustain a bill in equity by the donee against the executor of the donor, praying for a transfer of the stock mentioned in the certificate. (c)

Neither a *donatio inter vivos*, nor a *donatio mortis causa*, can be by mere parol. The rule of law in either case is, that a delivery of the thing intended to be given, is essential to the perfection of the gift. (d)

The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by

209 * the donor, with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus poenitentiae*, (which must be the case, where he retains the possession, and what is done, is merely by parol,) there cannot be a perfect and legal donation. (e)

A gift which is not good and valid at law, cannot be made good in equity.

The consideration of natural love and affection is sufficient in a deed, but a mere executory contract, cannot be supported on the consideration of blood, or natural love and affection. There must be something more, a

(a) Cited in *Carpenter vs. Ins. Co.* 4 Howard, 218. See *Roberts vs. Salisbury*, 3 G. & J. 425.

(b) Distinguished in *Mickle vs. Cross*, 10 Md. 360. See Rev. Code, Art. 65, sec. 37; *Equity Rules*, R. 27.

(c) See note (f), *infra*.

(d) Affirmed in *Bradley vs. Hunt*, 5 G. & J. 58; *Conser vs. Snowden*, 54 Md. 188; *Hitch vs. Davis*, 3 Md. Ch. 267. Distinguished in *Linthicum vs. Linthicum*, 2 Md. Ch. 24.

(e) Affirmed in *Nickerson vs. Nickerson*, 28 Md. 332; *Murray vs. Cannon*, 41 Md. 476; *Taylor vs. Henry*, 48 Md. 558. Cited in *Ins. Co. vs. Flack*, 3 Md. 354. Distinguished in *Harrison vs. McConkey*, 1 Md. Ch. 35; *Gardiner vs. Merritt*, 32 Md. 85. See note (f), *infra*.

valuable consideration, or it is not good, and cannot be enforced at law, but may be broken at the will of the party. (f)

(f) Approved in *Dugan vs. Gittings*, 3 Gill, 156. Some of the cases concerning gifts are classified in this note as follows: 1. Gifts *inter vivos*. 2. Gifts by way of declarations of trust. 3. Gifts of Savings Bank Deposits. 4. Forgiveness of debts. 5. Donations *mortis causa*.

Gifts inter vivos.—It is essential to the validity of a gift *inter vivos* that there be an actual transfer of all right and dominion over the thing given by the donor, with intent to vest the title in the donee, to go into effect at once, and an acceptance of the gift by the donee or some competent person for him. *Taylor vs. Henry*, 48 Md. 550; *Nickerson vs. Nickerson*, 28 Md. 327; *Cox vs. Sprigg*, 6 Md. 274; *Hitch vs. Davis*, 3 Md. Ch. 266; *Jackson vs. Railway Co.* 88 N. Y. 520; *Basket vs. Hassell*, 107 U. S. 614. The agreement of the parties operates at once as a transfer of rights *in rem*, and leaves no obligation subsisting between them. *Anson on Contracts*, 3. The donor cannot recover back a gift consummated by possession. *McNulty vs. Cooper*, 3 G. & J. 214. A voluntary, executory promise to give, or an imperfect gift will not be enforced. *Cox vs. Sprigg*, 6 Md. 274; *Dugan vs. Gittings*, 3 Gill, 138; *Dorsey vs. Packwood*, 12 Howard, 187. But a parol gift of land accompanied by possession, and where the donee upon the faith of the promise to give has made valuable improvements on the property, will be protected in equity, and the donor will be compelled to execute a conveyance. *Hardesty vs. Richardson*, 44 Md. 624; *Dugan vs. Gittings*, 3 Gill, 138. A gift of money or property by a parent to a child is presumptively an advancement; but this presumption may be rebutted. Whether such a gift is an advancement, or an absolute gift without a view to a portion or settlement, depends on the intention of the donor, and that intention may be ascertained by parol evidence of the donor's declarations at the time of executing the conveyance, or making the gift, or of the donee's declarations afterwards, or by proof of facts from which the intention may be inferred. *Graves vs. Spedden*, 46 Md. 533. Indebtedness of the donor at the time of executing a voluntary deed is *prima facie*, but not conclusive, evidence of fraud as against prior creditors. *Worthington vs. Shipley*, 5 Gill, 449; *Williams vs. Banks*, 11 Md. 198.

In the case of a gift of a *chose in action*, there must be a delivery to the donee of the instrument or document which is the evidence of a subsisting obligation, so as to vest the donee with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably. *Basket vs. Hassell*, 107 U. S. 614. The blank endorsement and delivery of a bond vests the donee with the right to the same. *McNulty vs. Cooper*, 3 G. & J. 214. Bank notes and promissory notes payable to bearer pass by delivery, and constitute valid donations when delivered. But it is otherwise in the case of a promissory note payable to a payee, or order, and not endorsed. *Bradley vs. Hunt*, 5 G. & J. 54. Where A. made a gift of personal property to B. by a bill of sale, in which it was provided that A. should not be debarred from using and enjoying the property during her life-time, it was held that this reservation did not qualify the absolute character of the grant, except only so far as to enable the donor to use the property during her life. *Hope vs. Hutchins*, 9 G. & J. 77. Where a mother, for natural love, &c. assigned by a writing not under seal, a single bill to her daughter, reserving the interest to herself during her life; but there was no delivery of the bill to the daughter, nor to any one as trustee for her, and no proof that the mother ever became such trustee,—nor did the obligor, although he had notice of the assignment, ever consent to be such trustee, but paid the bill when due by another obligation,

APPEAL from Chancery. The bill in this case was filed on the 18th of April, 1823, in Baltimore County Court, by Ann Patterson,

which the mother subsequently assigned and delivered to another daughter,—it was held that the first assignment was a purely voluntary gift, incomplete in itself for want of delivery to the daughter or to some one for her, which equity would not give vitality to, and that the mother had the right to make the subsequent assignment. *Cox vs. Sprigg*, 6 Md. 274. A promissory note payable to the order of A. not endorsed by him, retained by him during his life, and after his death in the possession of his executor, was claimed by his daughter as a gift, upon the ground that he had given it to her, but had retained it in his possession as her agent to collect the interest thereon for her, which he regularly paid to her during his life. *Held*, that whatever may have been the intention of A. he had not executed it in the mode necessary for the perfection of a parol gift, not having parted with his legal power and dominion over the subject-matter of the gift, which was void at law and could not be made good in equity. *Hitch vs. Davis*, 3 Md. Ch. 266. A gift of a carriage by a father to his daughter who was living with him, made in the presence of witnesses whom he called on to take notice of the gift is valid, if there was a plain declaration of gift and a surrender and acceptance of dominion. *Fletcher vs. Fletcher*, 55 Vermont, 325. In *Young vs. Young*, 80 N. Y. 430, the donor placed certain bonds in envelopes and signed a memorandum on them to the effect that the bonds belonged to his sons, but that the interest was reserved to himself during life, and that, at his death, they belonged absolutely and entirely to his sons. The bonds were kept in a safe to which all parties had access. *Held*, not to be a valid gift. The Court said: "To establish a valid gift, a delivery of the subject of the gift to the donee, or to some person for him, so as to divest the possession and title of the donor must be shown. The only way in which it is practicable to make a valid gift *in praesenti* of an instrument securing the payment of money, reserving to the donor the accruing interest, is by an absolute delivery of the security which is the subject of the gift to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest which he may collect thereon. But if the donor retain the instrument under his own control, though he do so merely for the purpose of collecting the interest, there is an absence of the complete delivery which is absolutely essential to the validity of a gift. A gift cannot be made by creating a joint possession of donor and donee, even though the intention be that each shall have an interest in the chattel."

In the case of gifts *inter vivos* between persons standing in a fiduciary or confidential relation to each other, it is incumbent on the donee to show that the gift was the free and voluntary act of the donor. Equity watches such transactions with jealous scrutiny and will set them aside without proof of actual fraud. *Todd vs. Grove*, 33 Md. 188; *Ringgold vs. Ringgold*, 1 H. & G. 9; *Highberger vs. Stiffler*, 21 Md. 338; *Snyder vs. Jones*, 38 Md. 543; *Griffith vs. Diffenderffer*, 50 Md. 483; *Eakle vs. Reynolds*, 54 Md. 305. Cf. *Couree vs. Cornell*, 75 N. Y. 101; *Audenreid's Appeal*, 89 Pa. St. 114.

As to gifts between husband and wife, see *George vs. Spencer*, 2 Md. Ch. 353; *Miller vs. Johnson*, 27 Md. 11; *Myers vs. King*, 42 Md. 66.

Gifts by way of a declaration of trust.—If a formal declaration of trust be made by the legal owner of property, declaring himself in terms the trustee of that property for a volunteer, or directing that it be held in trust for a volunteer, equity considers such a declaration as a trust actually created,

the appellant's intestate, against the appellee, James C. Gittings, as executor of James Gittings. Afterwards the proceedings were, at

although unaccompanied by a deed, or other act, divesting the donor of the legal estate. *Hill on Trustees*, 85-89. In *Morgan vs. Malleson*, L. R. 10 Eq. 475, and other recent cases, a tendency was shown to infringe on the rule that equity will not enforce an incomplete gift, by construing such gift into a declaration of trust, notwithstanding that the real intention of the donor was evidently not to make himself a trustee, but to divest himself of all interest. *Pollock Con.* 169. And in 2 *Schouler on Per. Prop.* 75, it is said that which would once have failed from imperfect delivery is now frequently upheld as a declaration of trust, or on the consideration that the donee might, as a matter of justice, come into a Court of equity and get his title perfected. But these cases have been disapproved in later judgments and in *Richards vs. Delbridge*, L. R. 18 Eq. 11, JESSELL, M. R. said: "A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be: or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forth on trust for the other person. * * The true distinction appears to me to be plain and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." See *Moore vs. Moore*, L. R. 18 Eq. 474; *Warringer vs. Rogers*, L. R. 16 Eq. 340; *Taylor vs. Henry*, 48 Md. 559, 560, to the same effect. The settlor must transfer the property to a trustee, or declare that he holds it himself in trust. If the settlement is intended to be effectuated by gift, the Court will not give effect to it by construing it as a trust. *Young vs. Young*, 80 N. Y. 480. Where the donor takes a receipt for the money, the subject of the gift and lent to a third person, wherein it is stated to be held by the donor in trust for the donee, accompanied by declarations to that effect, there is a sufficient declaration of the trust. *Smith vs. Darby*, 39 Md. 268. Where a husband, designing to give certain land to his wife, unites with her in conveying it to a third party in trust for the wife, the deed being signed, sealed, acknowledged and recorded, the gift is perfect, although the trustee named in the deed was ignorant of what was done, and afterwards refused to accept the trust. *Adams vs. Adams*, 21 Wallace, 185. As to gift of bank deposits in trust for the donee, see *infra*. A trust was once completely created, either by a formal instrument or by parol, where a parol declaration of the trust is sufficient, is beyond revocation by the simple act of the donor. *Taylor vs. Henry*, 48 Md. 560; *Paul vs. Paul*, L. R. 19 Ch. D. 47.

Gifts of Savings Bank Deposits.—In *Gardner vs. Merritt*, 32 Md. 78, a deposit of money in a Savings Bank by A. to the credit of B. subject to the order of A. accompanied by declarations of an intention to give, was held to be a valid gift as between A's representatives and B. In *Murray vs. Cannon*, 41 Md. 466, an account was opened in a Savings Bank to the credit of A. subject to his order or to the order of B., his daughter. After A's death, B. claimed that her father had given her, in his life-time, the pass-book with

the instance of the complainant, transmitted to the Court of Chancery on the 5th day of October, 1825. The bill stated that James

the money credited therein, to be held by her in trust for herself and her brothers. It was held that A. had not parted with the dominion and control over the money, and that a delivery of the pass-book was not a delivery of the money, because such delivery could only be effected by the payment of one account, and a new deposit in another. In *Taylor vs. Henry*, 48 Md. 550, it appeared that A. deposited money in a Savings Bank to the credit of himself and of B. his sister, and the survivor of them, subject to the order of either. After the death of A. the bank book was taken from his trunk by B. who drew the money. A's will, executed after the making of the deposit, disposed of this fund. Such deposit was held not to be a gift *inter vivos*, because A. did not divest himself of the dominion and control over the fund; he retained the pass-book and could have drawn the fund at any time. Also, not to be a *donatio mortis causa*, because the deposit did not appear to have been made with a view to A's death from the existing disorder, and because there was no delivery of the possession. Also, not to be a trust in A. for B. because there was no clear evidence of an intent to create a trust and of the execution of such intent. *Taylor vs. Henry*, is approved in *Northrop vs. Hale*, 73 Me. and *Gerrish vs. New Bedford*, 128 Mass. 159. In the latter case, where the question was whether a party depositing money in bank as trustee for another has made a perfect gift, the Court said: "Whether the donor has done what is necessary to create a trust depends on whether his conduct and declarations manifested a completed and executed intention in regard to it. Notice to the donee is, indeed, not necessary when other acts or declarations of the donor are sufficient and complete in themselves; but, where the transaction is capable of two interpretations and the settlement is merely voluntary, it is plain that a notice given by the donor to the donee of the existence of the trust would, in most cases, be decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property." In *Martin vs. Funk*, 75 N. Y. 184, where A. deposited a sum in a Savings Bank, saying that she wanted the account to be in trust for B. which was so entered, and the pass-book given to A. who retained it, and did not inform B. of the deposit, this was held to be a valid trust in favor of B. enforceable against the administrator of A. But see *Brabrook vs. Boston Five Cent Bank*, 104 Mass. 228; *Clark vs. Clark*, 108 Mass. 522; *Cummings vs. Bramhall*, 120 Mass. 552; *Robinson vs. Ring*, 72 Me. 141, *contra*. As to gift of Savings Bank deposits by way of *donatio mortis causa*, see *Conser vs. Snowden*, 54 Md. 175; *Sheedy vs. Roach*, 124 Mass. 472.

Forgiveness of debts.—An acknowledgment of the receipt of part payment of an existing debt, recited in an agreement under seal and delivered to the debtor, is proper evidence of an executed gift of the debt *pro tanto*. *Lamprey vs. Lamprey*, 29 Minn. 151. Where A. on his death bed said to his executrix that he had the bond of B. but when he died B. should have it and should not be troubled for it, on a bill by B. it was decreed that the bond should be delivered up and cancelled. *Wekett vs. Raby*, 8 Bro. Parl. C. 16, (*Story Eq. Jur.* s. 706,) approved in *Linthicum vs. Linthicum*, 2 Md. Ch. 21. In the last named case a single bill was decreed to be cancelled upon proof that the deceased obligee did not intend to exact payment of the money due upon it, but treated it as a gift and abandoned it as a debt—although this evidence consisted entirely of the parol declarations of the decedent. In *Strong vs. Bird*, L. R. 18 Eq. 315, B. borrowed £1,100 from his

Gittings, the father of complainant, late of Baltimore County, duly made his last will and testament, with a codicil thereto annexed,

stepmother, who lived in his house paying £212 a quarter for board, and it was agreed that the debt should be paid off by the deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter day the creditor refused to make any further deductions, saying that she did not want any more of the money lent returned, and paid the full amount of £212, and continued down to the time of her death, (which occurred more than four years afterwards,) to pay B. the like quarterly sum. B. was appointed sole executor of his stepmother, and proved the will. *Held*, that the debt was gone, 1st. Because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give, and 2nd. Because the intention of the testatrix to give B. the sum of £900 was completed by nine quarterly payments of £212 each. See also *Irwin vs. Johnson*, 36 N. J. Eq. 348-352, and cases cited in Reporter's note; *Carpenter vs. Soule*, 88 N. Y. 251; *Fitzhugh vs. Fitzhugh*, 11 Grat-tan, 218; *Wenby vs. Benhayden*, 1 S. & Rawle, 313.

Donationes mortis causa.—In order to render perfect a *donatio mortis causa*, three things must concur. 1. That the gift be made with a view to the donor's death. 2. That it be upon a condition, either express or implied, that it shall take effect only on the death of the donor by a disorder from which he is then suffering. 3. That there be a delivery of the subject of the donation. *Taylor vs. Henry*, 48 Md. 550. There is no difference in the legal requirements to make a good delivery in gifts *inter vivos* and *mortis causa*. In either case a delivery of possession is indispensable. *Conser vs. Snowden*, 54 Md. 175; *Basket vs. Hassell*, 107 U. S. 612; *Bradley vs. Hunt*, 5 G. & J. 54. The donee *causa mortis* has an inchoate title, defeasible upon the happening of any of the following conditions. 1. Actual revocation by the donor. 2. The donor's recovery from the illness from which he is then suffering. 3. The donee's death before that of the donor. 4. A deficiency of assets to pay the debts of the donor. *Basket vs. Hassell, supra*; *Taylor vs. Henry, supra*; *Mitchener vs. Dale*, 23 Pa. St. 59. *Donationes causa mortis*, have a double nature and the Roman Jurists were divided in opinion whether they should be treated as contracts or bequests. Justinian decided the controversy by enacting that they should be treated on the whole as legacies. *Inst.* 11. 7. *de donationibus*; *Marezoll Inst.* sec. 227. Although our doctrine on the subject of gifts is derived from the Roman law, a *donatio mortis causa* is treated as a gift *inter vivos*. The donee must be vested with complete possession, living the donor, and his title is defeasible upon the happening of any one of the four above mentioned conditions subsequent. *Basket vs. Hassell*, 107 U. S. 609. Therefore it would seem that the decision in *Ellis vs. Secor*, 81 Mich. 185; S. C. 18 Am. Rep. 178, was erroneous. In that case, on a slate by the bedside of E. who was found dead, was the following memorandum in her writing and signed by her: "I wish Dr. L. to take possession of all, both personal, real and mixed. I am so sick I believe I shall die: look in valise." In a valise was found a memorandum, written by her, directing Dr. L. to take all of her property. *Held*, a valid *donatio causa mortis* of personal property. The Court said that the deceased did all she could to make a gift *causa mortis*, and that her written declaration should prevail as a valid appointment to the uses indicated as fully as if there had been a manual delivery of the securities. In *Basket vs. Hassell, supra*, it is said: "If the gift does not take effect as an executed and complete transfer

bearing date, the former on the 16th of September, 1818, the latter on the 6th day of November, 1820, and thereby amongst other things gave and bequeathed unto the complainant certain bank stock, and ground rents, and after giving some other legacies, the testator ap-

to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will."

In *Bradley vs. Hunt*, 5 G. & J. 54, it was held that a promissory note, payable to a payee or order, and not endorsed by him, cannot be the subject of a *donatio mortis causa* by mere parol. But in *Waring vs. Edmonds*, 11 Md. 424, it was held that a bond payable to the deceased may be the subject of a *donatio mortis causa* without an assignment in writing. In this case the donor was *in extremis*, unable to write, conscious of the approach of death, declaring the gift and making delivery, and there was an open avowal of acceptance by the donee. Where the widow of the deceased claimed certain bonds for the payment of money as a *donatio mortis causa*, and it did not appear affirmatively at what time they were delivered by the deceased to his wife, whether in health or in his last sickness, it was held that she was not entitled to them. *Hebb vs. Hebb*, 5 Gill, 506. A conversation with a dying man, which may be considered as a narrative by him of what he had done upon a former occasion, is not sufficient to establish a *donatio mortis causa*. *Ibid.* Where A. some weeks before his death, delivered a promissory note due him to B. with directions to collect and apply it to certain purposes for his wife, but died before the money was so applied, it was held that this was not a gift either *inter vivos* or *causa mortis*, and that the proceeds of the note belonged to the estate of A. *Thompson vs. Dorsey*, 4 Md. Ch. 149. Where A. in her last illness and in expectation of death gave to her sister then present a negro girl, also present, by telling the girl: "there is your mistress, &c." it was held that this was a valid *donatio causa mortis*, there being an intention to give and an actual delivery. *Waring vs. Edmonds*, 11 Md. 424. In the same case, A. requested B. then present, who had charge of two negroes belonging to her, to deliver them, after her death, to her sister, also present, stating that she had given them her. This was also held to be a valid *donatio mortis causa*, B. being constituted agent and trustee to make the delivery. Where A. being sick, gave to B. *animo donandi*, an order on a Savings Bank for a sum of money, and also an order on the person having custody of the pass-book for the delivery of the same to B. and the donee failed to obtain the book and the money, living the donor, this was held not to be a valid *donatio mortis causa*, and the money standing in the name of A. in the bank at the time of her death passed to her legal representatives. *Conser vs. Snowden*, 54 Md. 175. Cf. *Beak vs. Beak*, L. R. 13 Eq. 489, to the same effect. A check given as a *donatio mortis causa* must be paid during the life-time of the donor. *Conser vs. Snowden*, *supra*. Cf. *Austin vs. Mead*, L. R. 15 Ch. D. 651; *Bromley vs. Brunton*, L. R. 6 Eq. 275; *Rolls vs. Pearce*, L. R. 5 Ch. D. 780. Where the holder of a certificate of deposit, payable to his order on surrender of the certificate properly endorsed, did, during his last illness, endorse the same: "pay to B. no one else, then not till my death. I may live through this spell; then I will attend to it myself;" signed his name, delivered the certificate to B. and died, this was held not to be a valid *donatio mortis causa*, because as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition. *Basket vs. Hassell*, 107 U. S. 602.

pointed Richard Gittings, Archibald Gittings, and James C. Gittings, his executors, and declared the said James C. Gittings his residuary legatee. That the said testator died on the 15th of February, 1823, without revoking said will, save by his codicil, and without revoking said codicil; whereupon the said Richard and Archibald Gittings, renounced the executorship, and the said James C. Gittings, the remaining executor, and residuary legatee, duly proved the said will, and undertook the execution thereof, as appears by exhibit A, filed as a part of the bill. That said executor took possession of the personal effects of the testator, to an amount more than sufficient to pay his debts, funeral expenses, and legacies. That said testator, about two years before his death, gave to * complainant the ground rent, arising from property in the City of Baltimore, worth, at the time of the donation, \$260 per annum. That in consequence of the depreciation in said property during the life of the testator, the complainant advised with a certain Edward Palmer, as to the course necessary to be pursued by her to repair the loss occasioned by such depreciation, and that Palmer, in conversation with said testator a short time before his death, was told by him that he was sorry the complainant had lost her said ground rents, and that something should be done for her. That soon after the aforesaid conversation, the complainant visited the testator at his residence, and that, on that occasion the testator gave, and handed to her, certificate No. 446, Commercial and Farmers' Bank of Baltimore, entitling the holder thereof to 75 shares of the capital stock of the said bank, as will appear by exhibit B. That said testator, at that time, and in her presence, endorsed his name on said certificate, informing her that he gave her the same, to supply the loss of the ground rent. That since the death of the testator, complainant has requested his said executor to transfer the said stock to her, which he refuses to do. Prayer, that he may be compelled to transfer the same, and for further relief.

Exhibit A, is a certificate of the Register of Wills of Baltimore County, of the granting of letters testamentary to the defendant.

Exhibit B, is as follows: "Commercial and Farmers' Bank of Baltimore, No. 446. February 9th, 1819—This is to certify, that James Gittings, Sen. is entitled to seventy-five shares in the capital stock of the Commercial and Farmers' Bank of Baltimore, on each of which thirty dollars have been paid, transferable at the said bank only, personally, or by attorney. GEO. T. DUNBAR, Cashier."

75 shares.

* The answer of James C. Gittings states, the testator, James Gittings, the father of complainant, did, about the time mentioned in the bill, duly make his testament and last will, whereby he did devise and bequeath certain property to the complainant; and after making various other devises and bequests in favor of his other children, and grandchildren, he declared this de-

fendant his residuary legatee, and constituted him, together with Richard Gittings and Archibald Gittings, joint executors thereof. The answer admits the death of the testator about the time specified, the renunciation of the other persons named as executors, and that he the defendant undertook himself the exclusive execution of said will, which he proved; and that he took possession of the personal estate of the testator, which he admits was more than sufficient to pay his just debts and legacies; the answer further admits the donation of the ground rent as charged, and a depreciation in the annual value thereof; it alleges that Palmer called on the testator, and in the presence of respondent mentioned the depreciation of the ground rent; that it then yielded nothing, and proposed to testator to take the ground rent back, and to give the complainant stock in lieu of it, which she would prefer; to this the testator replied, that it was too late, he had made his will, and could not alter it; the answer denies that the testator gave or intended to give to complainant the certificate for seventy-five shares of stock in the Commercial and Farmers' Bank, as alleged, and puts the complainant on the proof of the allegation; it denies also the delivery as stated; expresses a doubt of the genuineness of the endorsement of the name of James Gittings thereon, and supposes that the same was made a considerable time before his death. The defendant acknowledges that he refused to transfer the stock, from a conviction that complainant had neither a legal nor equitable title thereto.

A commission issued, under which proof was taken and filed, but the same does not appear to be material.

212 *BLAND, C. (11th June, 1827.) This case standing ready for hearing, and the solicitor of the plaintiff having been heard, and no counsel appearing for the defendant, the proceedings were read, and considered.

The answer is fully responsive to the bill. The defendant has positively denied every allegation, upon which the plaintiff has rested her equitable pretensions, and the proofs and circumstances are too feeble to sustain the plaintiff's case, in opposition to an answer so clear, and strong: Whereupon, it is decreed that the bill be dismissed with costs.

From which decree the complainant appealed to this Court.

The case was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Winchester and *Mayer*, for the appellant, contended: 1. That the answer is not fully responsive to the bill, and does not deny the allegations of it, so positively and directly, as to require the evidence of two witnesses, or one and circumstances to overthrow it. 2. That the rule in reference to answers should not be applied to this; if the representative capacity of the appellee, and the circumstances of the

case be considered. 3. That the fact of Mrs. Patterson's possession of the certificate endorsed by the testator, proved the delivery of it; and that the certificate so endorsed amounts to an equitable transfer of the stock, and considered with the evidence in the cause, entitled the complainant to a decree in her favor, even admitting the answer to be fully responsive, and to deny the equity of the complainant.

On the 3d point they referred to *Reed vs. Ingraham*, 3 Dallas, 505; 1 Cranch, 438, 439; *Roberts vs. Gibson*, 6 H. & J. 128; 1 Campb. 442; *Russell vs. Langstaff*, Douglass, 514; *Violet vs. Patton*, 5 Cranch, 142; 2 Stark. 308; 3 Stark. 1642; 3 Campb. 239; *Peacock vs. Rhodes*, 2 Douglass, 633; *Wilkinson vs. Nicklin*, 2 Dallas, 396; *Dugan vs. United States*, 3 Wheat. 172; *Chitty on Bills*, 173, 174.

On the 1st and 2d points they referred to *Ringgold vs. Ringgold*, 1 H. & G. 82; *Newell vs. Huntingdon*, 1 Johns. Ch. Rep. 107; *Kane vs. Bloodgood*, 7 Johns. Ch. Rep. 110; 9 Cranch, 153, 160.

They insisted that the gift of the stock would be good, as a *donatio mortis causa*. *Ward vs. Turner*, 2 Ves. Sr. 432, 442; 3 Atk. 215; *Hill vs. Chapman*, 2 Brown Ch. Rep. 613; *Blount vs. Burrow*, 4 Ib. 72; *Pember vs. Mathers*, 1 Ib. 52.

Taney, (Attorney-General,) and *U. S. Heath*, for the appellee. The answer is responsive to the bill, and denies the gift of the stock as well as the certificate, and it concludes its denial by calling on the complainant to prove her allegations. There is no proof that the endorsement on the certificate was made at the time of the alleged delivery, and unless that was the case, the endorsement can have no legal effect. If a bill had been filed against the testator to compel a transfer of the stock, a decree for that purpose could not have been obtained; how then can one be had against his executor? But suppose the allegation in the bill is proved, that is, suppose the certificate was actually endorsed, and delivered for the purpose of a donation, can the complainant recover? A contract between testator and complainant is not pretended, no consideration is charged or proved, and if there is any contract therefore, it is a contract to give, which is *nudum pactum* and void. To constitute a good gift of a chattel, there must be an actual delivery of the thing given, in pursuance of the gift. 2 Black. Com. 441; *Smith vs. Smith*, 2 Strange, 955; *Noble vs. Smith*, 2 Johns. Rep. 52. The stock, the subject of the supposed gift in this case, is a chattel; and a delivery of the certificate is not a delivery of the stock, which is a fund in bank, of which the certificate is not * even a muniment of title. By a delivery of the certificate, dominion over the stock is not transferred; the party notwithstanding is entitled to the dividends, and may cause a transfer to be made on the books of the bank; he cannot therefore be said to part with the property. 8 Petersdorf, 464. A delivery of South Sea annuities, by way of donation, does not divest the donor of his title to the stock. *Ward vs. Turner*, 2 Ves. Sr. 431; *Mary and Jane Tate vs. Hilbert*, 2 Ves. Jr. 111; *Bryson vs. Brownrigg*, 9

Ves. Jr. 1; *Powell on Mort.* 1028, *Coventry's Edition* (note;); *Noble vs. Smith*, 2 *Johns. Rep.* 52; *Fink vs. Cox*, 18 *Ib.* 145. Considering the certificate as a negotiable instrument, and admitting that the endorsement of the testator's name gave the appellant the right to write what she pleased over it, still this right is limited to the life of the testator. 2 *Ves. Jr.* 121; his death would be a revocation of the power. There is no distinction, in regard to the necessity of delivery between gifts *inter vivos*, and *mortis causa*. In both cases the gift is not good, unless the thing given be itself actually delivered. 3 *Cov. Powell*, 1027, note (E); *Ward vs. Turner*, 2 *Ves. Sr.* 431. Gifts which are invalid at law are equally so in equity. 3 *Cov. Pow.* 1029; 2 *Ves. Jr.* 128. But the very fact of their filing a bill in Chancery, shows the impression to have been that the gift was not good at law. This however is not a good gift either at law or in equity. The thing here alleged to be given is not tangible, and cannot be corporeally delivered. It cannot be transferred by gift therefore, unless by some act which gives to the donee complete dominion over it. Stock being the subject of the gift, there should have been a formal transfer. *Cov. Powell*, 1027, note (1,) 1028. The stock in this case was certainly not transferred; to effect that, is the object of the bill. The delivery of a note does not transfer the property, 2 *Ves. Sr.* 443, 444; *Ohitty on Bills*, 3, note (B,) and although the endorsement of it may, certainly the endorsement of a certificate of stock, cannot have
 215 * that effect, since the paper itself shows it to be transferable in a different way.

BUCHANAN, C. J. delivered the opinion of the Court. The bill was filed to compel the defendant, the executor of James Gittings, to transfer to the original complainant, Ann Patterson, daughter of the testator, seventy-five shares of stock, of the Commercial and Farmers' Bank of Baltimore; a certificate of which, it alleges, was given and delivered to her by the testator, who, it is stated, endorsed his name on the back of the certificate in her presence, and at the same time informed her that he gave her the stock.

The answer admits the name of the testator, endorsed upon the certificate to be in his hand-writing, but denies that he gave or intended to give the certificate of stock to Ann Patterson, as alleged, and puts the complainant on proof of the allegation; and denies also the delivery of the certificate as stated. It may not perhaps be amiss here to remark, that the answer of an executor or administrator in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule, that an answer asserting a fact responsive to the bill, can only be disproved or outweighed by the testimony of two witnesses, or one with pregnant circumstances. A plaintiff, by calling on the defendant to answer the allegations in his bill upon oath, makes the answer evidence; and as one witness would only be

equivalent to the answer, and the plaintiff to prevail must have preponderating proof, it is necessary that he should have another witness, or circumstances in addition to the testimony of one, in order to turn the scale. But looking to an answer as testimony only, it must be treated as any other testimony, and the weight of it must, from the very nature of evidence, in some degree depend on the fact it asserts. Therefore when an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but * amount to an assertion of his impressions; and his speaking positively **216** cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. And upon the obvious principle, that when a witness asserts a fact, of which further developments in the course of his examination prove him to be in a situation to prevent his having a full knowledge of the subject, his testimony is not entitled to the weight of that of a man swearing to facts, which may be fully within his knowledge. The answer in this case, is of that description; and is not, we think, such as to require the testimony of two witnesses, or one with circumstances to outweigh it. But as it does not admit the allegations in the bill, it puts the complainant on proof, and leaves him to sustain them as he can, unembarrassed by any supposed responsive features, of the answer. Under the view however, that we had taken of the case, it is not necessary to examine whether the allegations in the bill have been sufficiently established or not, by the proof in the cause. For supposing them to be fully proved, it does not appear to us that the object of the bill can be gratified. The alleged gift seems to have been intended as a *donatio inter vivos*; but whether a *donatio inter vivos*, or *donatio mortis causa*, makes no difference. Such a gift cannot be by mere parol. The rule of law in either case is, that a delivery of the thing intended to be given, is essential to the perfection of the gift. This is admitted; indeed it cannot be denied. As to donations *inter vivos*, it has never been doubted, that delivery of the thing intended to be given is indispensable; and the same principle is now equally well settled in relation to donations *mortis causa*. The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by the donor with the legal power * and dominion **217** over it. If he retains the dominion, if there remains to him a *locus penitentiae* (which must be the case, when he retains the possession, and what is done, is merely by parol,) there cannot be a perfect and legal donation, and that which is not a good and valid gift in law, cannot be made good in equity.

Proceeding upon this principle, the relief sought in *Mary Tate vs. Hilbert*, and *Jane Tate vs. Hilbert*, *2nd Vesey, Jr.* 112, was refused where a man, a short time before his death, gave one a check on his banker, which was not presented before his death, and to the other a promissory note, both of them being his relations. They were strong cases, particularly that of the check, which, if it had been presented before the death of the deceased, would have been paid, the banker having sufficient funds in his hands.

But the money, the thing that was intended to be given, not having been delivered, they were not good and available donations in law; the promissory note and the check being only evidences of contract, they did not transfer the possession of the money, nor invest the persons to whom they were respectively given, with the legal dominion over it, which continued in the deceased until his death, when the property vested in the executors. A promissory note delivered as a donation, is not a vested gift of the money, but only a promise or engagement to give; and imposes no stronger obligations, nor affords a better ground of action, than a promise to deliver any chattel as a gift. Such intended donations cannot be enforced on the consideration of blood, which has been insisted on in this case, and was probably a leading motive with the defendant's testator; in the cases referred to, in *2nd Vesey, Jr.* 112, *Mary Tate* and *Jane Tate* being stated to have been his relations.

The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood, or natural love and affection, there must be something more; a valuable consideration, or * it is not good and cannot be enforced at law, but may be broken at the will of the party. **218** And being void at law for want of a sufficient consideration, Chancery cannot sustain and enforce it. The cases of *Mary Tate*, and *Jane Tate vs. Hilbert*, have been mentioned as striking cases, in which the Lord Chancellor manifested a strong desire, more than once expressed, to grant the relief prayed; a desire not foreign from us, so far as sitting here we are permitted to entertain it, but we are, as he then was, restrained by the settled and stubborn rules of law. The case of *Ward vs. Turner*, *2nd Vesey, Sen.* 431, is just this case. It was a bill to compel a transfer of South Sea annuities, the receipt for which had been delivered to the complainant's testator by one Flog, saying, "I give you, Mosely, these papers, which are receipts for South Sea annuities, and will serve you after I am dead." It was argued for the complainant that the delivery of these receipts, with the strong words of gift accompanying it, was as much as could be done towards giving the annuities, except a mere transfer in the books. But it was held that the annuities being the thing intended to be given, a delivery of the annuities was indispensably necessary

to make it a good donation; that the delivery of the receipts was not sufficient, and that such a donation could not be made without a transfer, or something equivalent, that being the only mode in which stock or annuities are susceptible of being delivered.

It is supposed that this case differs from that, because, as is alleged, that James Gittings, at the time of delivering the certificate of stock to his daughter, endorsed his name upon the back of it (which does not appear to have been done by Flog, when he delivered the receipts for the annuities) which, it is contended, gave her authority to write over it a full assignment or a power of attorney, which would have enabled her to go to the bank, and cause a transfer of the stock to be made to her on the books. But it is not perceived that this makes any difference, nor is it necessary to inquire whether that endorsement gave any such authority; * if it did, it never was executed. It appears upon the face of the certificate **219** itself that the stock was transferable at the bank only, and it is admitted that the endorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate, that was the subject of the intended gift, it matters not whether the endorsement was in full or in blank; for as in the case of the check on the banker, which not being presented and paid in the life-time of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the check might, by presenting it in the life-time of the maker, have obtained the money, and thus perfected the gift; so here, even if by the endorsement of the certificate, whether filled up or remaining in blank, Mrs. Patterson might have gone to the bank in the life-time of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery. It was not a valid gift in law, otherwise there would have been no necessity for going into Chancery to perfect it. And being void in law, Chancery cannot interpose to make it good or enforce it. If Mr. Gittings was alive, it could not be seriously contended, that he could be compelled to transfer the stock in the absence of any consideration; and the same principle applies to his executor. His death does not make that good, which was bad before.

Decree affirmed, with costs.

220 * WATKINS' Adm'rs vs. STATE, use SHAW, Adm'r of WELLS.
June, 1830.

I. and P. were joint executors of W. who left a son, for whom I. was also appointed guardian. In an action brought by the administrator of that son on the guardian's bond, against one of I's sureties, it appeared that many years before the commencement of the suit, the joint executors had received a considerable amount of assets, but had not settled any account with the Orphans' Court, and that P. was dead: *Held*, that I's guardianship ceased with the death of his ward, and as it did not appear that he died after P. and after I. became sole executor, the action could not be sustained. (a)

Where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property in his hands, to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a final account has been passed by the Orphans' Court, or not. (b)

But where there is a joint executorship, this construction of law cannot consistently with principle prevail: because his co-executor is entitled to the possession of the assets equally with the guardian, and the property of his ward cannot be legally considered in his hands, until he has actually received it. (c)

ERROR to Anne Arundel County Court. This was an action of debt, brought on the 25th of October, 1815, in the name of the State, at the instance, and for the use of James Shaw, surviving administrator of Richard W. Wells, against the appellant's intestate, Nicholas Watkins of Thomas, after whose death, Rachel H. Watkins, and Benjamin Watkins, the present appellants, as his administrators, became parties to the suit, on a bond, executed by a certain John Boyd Watkins, as guardian of the said Richard W. Wells, in which the intestate of the appellants was a surety, dated on the 12th day of September, 1803, conditioned as follows: "That if the above bounden John Boyd Watkins, as guardian to Richard W. Wells, of Anne Arundel County, shall faithfully account with the Orphans' Court of said county, as directed by law, for the management of the property, and estate of the orphan under his care, and shall also deliver up the
221 said property, * agreeably to the order of said Court, or the direction of law, and shall in all respects perform the duty of guardian to the said Richard W. Wells, according to law, then the above obligation shall cease, it shall otherwise, &c." The defendants

(a) Examined and approved in *Hanson vs. Worthington*, 12 Md. 440.

(b) Approved in *State vs. Cheston*, 51 Md. 377; *Kirby vs. State*, *Ibid*, 392. Cited in *Bank vs. Sharp*, 53 Md. 527; *In re Williams*, 1 Md. Ch. 27; *Thomas vs. Wood*, *Ibid*, 304; *Lark vs. Linstead*, 4 Md. Ch. 166; *Conner vs. Ogle*, 4 *Ib*. 448. See *State vs. Jordan*, 3 H. & McH. 120.

(c) Cited in *Coburn vs. Harris*, 53 Md. 373.

pleaded performance by the said John Boyd Watkins.—Replication, non-performance, and issue.

1. At the trial the plaintiff offered evidence, that the plaintiff's intestate was entitled to one-third part of the personal estate of John Wells, deceased; that John Boyd Watkins was surviving executor of the said John Wells, and guardian to the plaintiff's intestate: he then produced a list of desperate debts returned to the Orphans' Court by said John Wells' executors, and offered parol proof of the solvency of Jacob Franklin, one of the debtors in that list, for the purpose of charging the defendant with the plaintiff's proportion of said debt, but the Court (KILGOUR and WILKINSON, A. J.) were of opinion that such parol evidence was not admissible, to charge the defendant's intestate, as one of the securities in the guardian bond, on which this suit is brought. The plaintiff excepted.

2. The plaintiff then offered to read to the jury the following paper: "General Court: October Term, 1804, Philemon Sherwood and John Boyd Watkins, Ex'rs of John Wells *vs.* John Gassaway: Judgment for £56 7 0 current money, debts and costs; to be released on payment of £28 3 6, current money, with interest from the 15th of September, 1798, till paid and costs;" which said paper was admitted to have the same legal effect and operation, as a full transcript of the record of proceedings in said cause; and also offered to prove, by competent evidence, that said Gassaway, against whom said judgment was rendered, was, at the time of the rendition thereof, and for many years afterwards, in solvent circumstances, and possessed of visible property, and that the amount of the said judgment might have been collected of said defendant. The defendant objected to this evidence as inadmissible to charge the defendant's intestate as one of the securities in the guardian's bond, on which * this suit is brought. The Court sustained the objection, and the plaintiff excepted. 222

3. The plaintiff then proved, that John Boyd Watkins, who was the guardian of the plaintiff's intestate, appointed by the Orphans' Court of Anne Arundel County, was one of the executors of John Wells, to one-third of whose estate, after payment of debts and legacies, the plaintiff's intestate was entitled; that letters testamentary on the estate of the said John Wells were granted to said John Boyd Watkins and a certain Philemon Sherwood, on the 17th of June, 1803. The plaintiff then, to prove his claim, read in evidence to the jury the inventory returned by the executors aforesaid, on the 26th of July, 1803, and an account of sales dated the 16th of December, 1803, and shewing that assets came to the hands of the executors to the amount of \$5,244.77 after deducting the specific bequests. The plaintiff offered no evidence of any settlement by the executors in the Orphans' Court, and no proof that such settlements have not been made there by the executors. The defendants objected, that said inventory and account of sales returned as aforesaid, and with-

out shewing the settlements in the Orphans' Court, could furnish no evidence of the amount of the distributive share to which the plaintiff's intestate was entitled, so as to charge therewith the security in the guardian's bond, and so prayed the Court to instruct the jury. The Court refused this prayer, being of opinion that the inventory and account of sales were evidence of themselves, unless settlements with the Orphans' Court were produced of the amount of the distributive share of the plaintiff's intestate, and would entitle the plaintiff in this cause to recover one-third part thereof, unless the defendants entitle themselves by legal proof to deductions from the amount thereof. The defendants excepted.

4. The plaintiff having produced the inventory of the estate of John Wells, and account of sales, as stated in the former bills of exceptions, which it is agreed shall be taken as a part of this bill of ex-

223 ceptions, and having rested his * claim upon that evidence. The defendants proved that Sarah, the daughter, and one of the residuary legatees of John Wells, intermarried with Philip Sherwood, one of the executors, before the death of her father. That John Boyd Watkins, the other executor, was appointed by the Orphans' Court, guardian to John H. Wells, another of the children, and residuary legatees of the said John Wells. They also proved that Richard H. Wells, the plaintiff's intestate, died a few years after his father, and while an infant. They further produced and read in evidence to the jury, an account passed by the Orphans' Court, the 10th day of December, 1817, and then gave in evidence to the jury the writ issued in this cause, on the 25th day of October, 1815; and they thereupon prayed the Court to instruct the jury, that if they should be of opinion from the evidence in the cause, that the daughter aforesaid of the said John Wells, married Philemon Sherwood, one of the executors of the said Wells; and that John Boyd Watkins, the other executor, was appointed guardian to John H. Wells, another of the children, and residuary legatees of the said John Wells; also that the said plaintiff's intestate died a very few years after the death of his father, and was an infant at the time of his death, and that the aforesaid settlement of the estate of the testator with the Orphans' Court, took place on the 10th day of December, 1817, more than two years subsequently to the institution of this suit, then the plaintiff is not entitled to recover in this suit a distributive share of the estate of the said John Wells, which, by the will of the said John Wells, was left to the plaintiff's intestate. The Court refused to give this instruction. The defendants excepted, and the verdict and judgment being against them, they brought the present writ of error.

The cause came on to be argued before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

Magruder and Randall, for the appellants, cited * *Barker* 224 vs. *Parker*, 1 Term Rep. 287; *Pearsall vs. Summerset*, 4 Taunt. 592; *Leadley vs. Evans*, 9 Ser. & Low. 306; The Act of 1798, ch. 101, sub-ch. 11, sec. 1; sub-ch. 12 and 5; *Drury vs. Conner*, 1 H. & G. 224; *Quynn vs. The State, use of Pue*, 1 H. & J. 36; *Ellicott et al. vs. The Levy Court*, *Ib.* 359; *Wilson vs. Boyer*, *Ib.* 297; *State, use of Key vs. Jordan*, 3 H. & McH. 179; 2 Harr. Entries, 326; *Downes vs. State, use of Tilden*, 3 H. & J. 239; *Seegars, Ex'r vs. State, use of Betton*, 6 H. & J. 162; 1 Root's Rep. 51; *Stilwell vs. Mills*, 19 Johns. Rep. 304; *Wiser vs. Blackly*, 1 Johns. Ch. Cas. 607.

Alexander and Flusser, for the appellee, cited *Dukehart, Ex. vs. The State*, &c. 4 H. & J. 506; 2 Philips' Ev. 296; 2 Fonb. 184; *Bishop vs. Chichester*, 2 Bro. Ch. Cases, 163; *State, use Key vs. Jordan*, 3 H. & McH. 179; *Seegars, Ex. vs. State, use of Betton*, 6 H. & J. 162; The Act of 1798, ch. 101, sub-ch. 111, sec. 16; *State, use of Chamberlaine's Ex. vs. Wright*, 4 H. & J. 148; *Frederick vs. Frederick*, 1 P. Wms. 710; *Lechmen vs. Earle of Carlisle*, 3 *Ib.* 215.

*STEPHEN, J. delivered the opinion of the Court. This 225 action was instituted against Nicholas Watkins, of Thomas, the appellant's intestate, one of the sureties of John Boyd Watkins, now deceased, to recover from him, in his character of surety for said Watkins, as guardian to Richard W. Wells, the appellee's intestate, a certain sum of money, charged to be in the hands of Watkins, his principal, and for which it was charged he had not accounted according to law. This sum of money was claimed to be recovered by the appellee, as administrator of Richard W. Wells, one of the representatives of John Wells, deceased, who by his will appointed John B. W. and Philemon Sherwood, his joint executors. It no where appears when John Wells, the testator, died; but it appears that letters testamentary on his estate were granted to the said John B. W., and Philemon S., on the 17th day of June, 1803. It was also proved, that Richard W. W. died a very few years after his father, and while an infant. An inventory of the estate was returned by the executors, on the 26th day of July, 1803, and an account of sales dated the 16th December, 1803, shewing that assets came to the hands of the said executors, to the amount of \$5,244.77, after deducting the specific bequests. No proof was offered of any settlement in the Orphans' Court, prior to the institution of this suit, which was commenced on the 25th October, 1815. It does not appear by any proof in the cause, when Philemon S. the co-executor of Watkins, died, the pleadings and the evidence being perfectly silent as to that fact. This suit being instituted on the guardian's bond, the question which this Court is called upon to determine is, whether, upon the above statement of facts, the administrator of the ward was entitled to recover? This Court are of opinion that where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property then in

his hands, to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a
226 * final account has been passed by the Orphans' Court or not; upon the principle, that what the law has enjoined upon him to do, shall be considered as done, and from that time he holds the ward's proportion of the property, by operation of law, in that character in which he would be entitled to receive it, upon a final completion of his trust as executor. But where, as in this case, there is a joint executorship, this construction of law cannot, consistently with principle, prevail; because his co-executor is entitled to the possession of the assets, equally with himself, and the property of his ward cannot be legally considered in his hands, until he has actually received it. As to the powers and rights of co-executors, see *Toller on Ex.* 359: "Co-executors, we may remember, (he observes,) are regarded in law as an individual person: and by consequence, the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all; for they have a joint and entire authority over the whole property. Hence a release of a debt by one of several executors, is valid, and shall bind the rest."

In this case, it is true John B. W. survived Sherwood, his co-executor, but it does not appear by the evidence in the cause, that his ward was then living, (which fact it was incumbent on the plaintiff to prove,) and if he was dead, his guardianship had expired, and he was no longer accountable in that character.

Judgment reversed.

227 * STODDERT vs. THE VESTRY OF PORT TOBACCO PARISH.
 June, 1830.

In an action by a vestry of a church, (a corporation) to recover the price of a pew, it appeared by the evidence of one of the members of the vestry, that he had acted as auctioneer in the sale of the pews, and had put down in pencil, at the time of the sale, on paper, the name of the purchaser, the defendant, and the price at which a pew was bid off. This memorandum was delivered to the register of the vestry, who transcribed it in the record book of their proceedings, returned it to the witness, who had made diligent but unsuccessful search for it, and believed it was lost. *Held*, that parol evidence of the price of the pew, and that it was sold on a credit of twelve months, bearing interest from the time of sale, as it would have established a different contract from that contained in the memorandum, was not competent to go to the jury, and that the corporation were authorized to employ one of its members as an agent, and of course there was no want of legal competency in such member to be an agent for the purchaser in making the memorandum required by the Statute of Frauds, and that it was unnecessary for the plaintiff, to shew their title to the pew. (a)

(a) Cited in *Bladen vs. Wells*, 30 Md. 585.

APPEAL from Charles County Court. Assumpsit by the Vestry of Port Tobacco Parish, the appellee, against John T. Stoddert, the appellant, instituted on the 7th of March, 1825. The declaration alleged, "that whereas heretofore to wit, on the 29th June, 1818, at, &c. the said John T. Stoddert, was indebted to the said Vestry, in the sum of \$300, current money, for a certain pew, No. 14, in Christ Church, in Port Tobacco Parish aforesaid, situate in Charles County aforesaid, before that time bargained and sold by the said Vestry, to the said John T., together with the rights and privileges to the said pew appertaining, and at the special instance and request of him, the said John T. to wit, &c. at, &c. and being so indebted to the said John T., in consideration thereof, afterwards to wit, on, &c. at, &c. undertook to, and then and there faithfully promised, &c." The defendant pleaded *non assumpsit*, on which issue was taken.

1. At the trial the plaintiff proved by a witness, who, it was admitted by the plaintiff, was, at the time of the sale, a * member of the Vestry of Port Tobacco Parish; that he acted as **228** auctioneer in the year 1818 or 1819, when the defendant was the highest bidder for a pew in Christ Church in Port Tobacco Parish, and it was struck off to him at the price of \$300, on a credit of twelve months, with interest from the time of sale. That he, the witness, put down in pencil at the time, on paper, the name of the purchaser, and the price at which it was bid off. That the witness delivered the memorandum thus made out, to the register of the said Vestry, who transcribed it in the record book of their proceedings. He also proved that the said memorandum was then delivered to witness, who had made a diligent but unsuccessful search for it, and believed it was lost. The record of the Vestry was then read in evidence to the jury, for the purpose of proving said sale. The defendant then prayed the Court to exclude, as incompetent, the parol evidence of the said witness, as to the said sale and purchase of the said pew at the auction aforesaid; but the Court permitted it to go to the jury. The defendant further prayed the Court to instruct the jury, that the auctioneer at the sale, being one of the Vestry, who were the vendors, could not make such a memorandum as would gratify the requisitions of the Statute of Frauds, in relation to the sale of real estate. The Court refused the prayer. The plaintiff then proved that the defendant had been heard to offer the said pew in exchange for a pew in a different church, but gave no other evidence of possession or ownership by the defendant, who thereupon prayed the Court to instruct the jury, that the plaintiff was not entitled to recover, having offered no evidence of right or title to said pew, but the Court refused to give the instruction as prayed, and the verdict and judgment being for the plaintiff, the defendant prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., MARTIN, and ARCHER, JJ.

229 * *Stonestreet*, for the appellant, contended. 1. That the County Court erred in permitting parol evidence to go the jury, to prove a contract for the sale of an interest in real estate. *Randall's Peake*, 234, (note;) 2 *Wheat. Selw.* 641. 2. That the memorandum in writing, made by the auctioneer at the time of sale, was not sufficient to prove the contract. 2 *Saund. Plea. & Ev.* 52; 2 *Campb.* 205; 2 *Wheat. Selw.* 741. 3. That the auctioneer being one of the vendors of the estate, cannot be presumed to be the agent of both parties, so as to make his memorandum of the sale evidence of the contract.

Chapman, for the appellee, on the first point, cited *Sugden on Vend.* 66, 67; 2 *Phillips' Ev.* 398, 399. On the third he referred to 1 *Phillips' Ev.* 58. And to show that the acts of the appellant amounted to such a performance as bound him, he referred to *Sugden on Vend.* 84.

ARCHER, J. delivered the opinion of the Court. The parol evidence offered of a sale of a pew was inadmissible, because it would have established a contract different from that contained in the lost memorandum. No parol evidence is admissible to add to, or vary the memorandum. In the second prayer submitted to the consideration of the Court below, no point is raised on the sufficiency of the memorandum of sale, except that it is objected that the witness, being one of the corporation, could not act as agent. As it regards the memorandum, the contents of which have been offered in evidence, we shall not express an opinion, but confine ourselves to the particular point raised. We think there can be no question of the right of a corporation to employ one of its members as an agent, and of course, no want of legal competency existed in such member to be an agent. He cannot be considered in the impossible, and therefore absurd position, as has been urged, as agent for himself; but must be viewed as acting in his individual capacity for a corporation. And if the corporation * could constitute him

230 their agent, there is nothing in his peculiar relation to it, which would disable him from being (within the meaning of the statute) an agent for the purchaser also, for his interest, being a corporate interest, could not disqualify him from acting in this latter capacity. Nor do we deem it necessary that the plaintiffs should have offered evidence of their right and title to the pew to enable them to recover.

Judgment reversed, and procedendo awarded.

THE PLANTERS' BANK OF PRINCE GEORGE'S COUNTY vs. SELLMAN.—June, 1830.

In an action against the endorser of an inland bill of exchange, payable after date, which had been protested for non-payment, and due notice thereof given to the defendant, a letter from the plaintiff to the administrator of the drawer of the bill, dated some time after the bill became due, was given in evidence by the defendant, which stated that the plaintiff "had agreed with the drawer to secure the amount of the said bill, and others, drawn by him and protested, by instalments, to wit, \$300 every sixty days, and requiring payment of two instalments then due"—*Held*, that in the absence of proof of any consideration to support the agreement mentioned in the letter, the County Court erred in giving an unqualified instruction to the jury, that the defendant was discharged from all liability. (a)

The holder of a bill of exchange may by an agreement with the drawer to give him further time for payment, discharge an endorser.

But it is not every mere naked agreement, by the holder with the drawer for delay, that will discharge the endorser after he has been fixed in his responsibility by non-payment, and due notice given. (a)

It is clear, both on principle and authority, that it must be a binding engagement, without the assent or concurrence of the endorser, and one that will suspend the holder's remedy, and restrain him from bringing suit against the drawer before the expiration of the time given, to the prejudice of the endorser, or so as to affect his rights. (b)

To do this, it must have a sufficient consideration to support it, otherwise it is *nudum pactum*, and does not affect or suspend the rights of any of the parties. (c)

* APPEAL from Anne Arundel County Court. Assumpsit by the holders, the appellants, against the appellee, John **231** Sellman, the endorser of an inland bill of exchange, commenced July 17th, 1826. The general issue was pleaded.

At the trial the plaintiffs read in evidence the following bill of exchange: "\$550. Tracey's Landing, August 2d, 1823. Thirty days after date, pay to John Sellman, or order, five hundred and fifty dollars, for value received, and place the same to my account T. Tongue. Messrs. B. D. and R. Mulliken, Baltimore. Endorsed, John Sellman. Pay to James L. Hawkins, Esquire, Cashier, or order. T. Tyler, Cashier. Accepted, B. D. and R. Mulliken." And proved the hand-writing of the defendant, endorser of the said note. They also proved, that the same was in due time presented for acceptance, and was accepted; also the demand of payment of the

(a) Approved in *Somerville vs. Marbury*, 7 G. & J. 281; *Mitchell vs. Williamson*, 6 Md. 217; *Bank vs. Sprigg*, 11 Md. 398.

(b) Approved in *Hunter vs. Van Bomborst*, 1 Md. 517.

(c) Approved in *Hoffman vs. Combs*, 9 Gill, 286.

drawer, protest for non-payment and notice thereof to the defendant in due time. The defendant thereupon read in evidence, a letter written by the cashier of the Planters' Bank of Prince George's County, the plaintiffs in this cause, bearing date the 10th February, 1826, and directed to the administrator of the drawer, Thomas Tongue, informing him that the plaintiffs had agreed with the said Thomas Tongue, to receive the amount of the said note, and other notes drawn by him and protested, by instalments, to wit, \$300 every sixty days, and requiring payment of two instalments then due.

Thereupon the defendant by his counsel prayed the Court to instruct the jury, that by reason of the said agreement with, and extension of credit to the drawer aforesaid, without the consent of the defendant, the latter was discharged from all liability, and their verdict must be for the defendant, of which opinion the Court [KILGOUR and WILKINSON, A. J.] were, and so instructed the jury.

The plaintiffs excepted, and the verdict and judgment being for the defendant, the present appeal was taken.

232 * The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Magruder, for the appellants, contended. That admitting that such an agreement, as that referred to in the bill of exceptions, founded on a valuable consideration, would have discharged the endorser, yet in this case, it was an agreement without any consideration, *nudum pactum*, and therefore does not release the endorser. *McLemore vs. Powell*, 12 *Wheaton*, 554, 556.

Alexander, for the appellee. In the case in *Wheat*. there was positive proof of the absence of consideration. In this case, the letter of the cashier of the appellants speaks of an agreement, and that term imports a consideration. *Wain vs. Warlters*, 5 *East*, 10. The word agreement being introduced in the record, must receive its technical definition. *Cabell vs. Vaughan*, 1 *Saund.* 291, (*note* 1,) Tongue, the drawer, was bound by his agreement to pay the bills, by instalments as stipulated, and if he was bound, so was the bank, mutuality being of the essence of the contract. The promise by Tongue was to pay a precedent debt, or rather debts, first consolidating them and thereby changing the nature of his original undertaking. He referred in his argument to *Clopper vs. Union Bank of Maryland*, 7 *H. & J.* 100; *Cro. Chas.* 504, 548; *Gould vs. Robson & Keymer*, 8 *East*, 576; *Wheat. Selw.* 36; *Boulbee vs. Stubbs*, 18 *Ves. Jr.* 20; *Rees vs. Berrington*, 2 *Ves. Jr.* 540.

BUCHANAN, C. J., delivered the opinion of the Court. This suit was originally brought on a bill of exchange drawn by Thomas Tongue, on Messrs. B. D. and R. Mulliken, payable to the defendant, John Sellman, or order, and by him endorsed to the plaintiff; and protested for non-payment, of which due notice was given to the de-

fendant. The general issue was pleaded, and at the trial the defendant * gave in evidence a letter written by the cashier of the Planters Bank of Prince George's County, to the plaintiff, dated after the protest for non-payment and notice, and directed to the administrator of Tongue, the drawer, informing him that the plaintiff had agreed with Tongue to receive the amount of that bill, and other notes drawn by him, and protested, in instalments of \$300, every sixty days, and requiring payment of two instalments then due. And upon the prayer of the defendant's counsel, the Court below instructed the jury, that by reason of that agreement with, and extension of credit to the drawer, without the consent of the defendant, the defendant was discharged from all liability, and their verdict must be for him. To this instruction a bill of exceptions was taken on the part of the plaintiff, on which the only question presented to this Court arises; and that is, not, whether the holder of a bill of exchange may, by an agreement with the drawer, to give him further time for payment, discharge the endorser, which is a doctrine too well settled now to be examined, but what kind of agreement it must be to work that effect. And we think it is not every mere naked agreement, by the holder with the drawer for delay, that will discharge the endorser, after he has been fixed in his responsibility by non-payment, and due notice given; but clear both on principle and authority, that it must be a binding engagement, without the assent or concurrence of the endorser, and one that will suspend his remedy, and restrain him from bringing suit against the drawer, before the expiration of the time given, to the prejudice of the endorser, or so as to affect his rights—and to do this, it must have a sufficient consideration to support it, otherwise it is *nudum pactum*, and does not affect or suspend the rights of any of the parties for a moment; but (like any other agreement that is void for want of consideration,) not being binding on the holder, he is not restrained from suing, but is left free to prosecute his rights, as if no such agreement to extend the time of payment had been made. And the ground upon which an extension of time by the holder * to the drawer is held to discharge the endorser after notice of non-payment, being, **234** that the agreement for delay ties up the hands of the holder, and suspends his present rights; it follows, that an agreement which, for want of consideration, is not obligatory on the holder, and does not suspend his remedy or rights, will not have the effect to discharge the endorser. *Chitty on Bills*, 371, 373, (*Ed.* 1821,) 379, (*note C*;) *Arundel Bank vs. Goble*; *Walwyn vs. St. Quintin*, 1 *Bos. and Pull.* 652; *McLemore vs. Powell*, 12 *Wheat. Rep.* 554. And why should it? The holder is under no obligation of active diligence. As long as he is passive, all his remedies remain, and he may forbear to sue as long as he pleases; and such forbearance will not operate to discharge the endorser, whose rights are not suspended; but by paying the bill he may regain the possession, and reinstate himself in the ownership of

it, and thus become entitled to a remedy on the instrument, against all the antecedent parties. So in the case of a naked agreement by the holder to give time, which being void for want of consideration, is not binding upon him, and does not suspend the rights or remedies of any of the parties. And being therefore no more to the prejudice, and not affecting the rights of the endorser, more than a mere forbearance by the holder to sue, without any express agreement, there is no reason why the endorser should be discharged in one case, more than in the other. But not so in the case of a valid agreement for delay, having a sufficient consideration to support it; which being binding on the holder suspends his remedy on the bill, until the expiration of the time agreed upon. And if in the meantime the endorser discharges the bill, he only places himself in the situation of the holder, with no other rights, and he takes the bill subject to all the equity of the drawer, as against the holder himself, whilst it was in his hands, whose right to sue was suspended by the agreement. Such an engagement therefore does injuriously affect the rights of the endorser, and discharges him from his liability, if made without his concurrence. The only evidence in the record

235 * in this case, touching the agreement relied upon by the defendant, between the plaintiff and Tongue, the drawer, for an extension of credit, is that which is furnished by the letter of the cashier of the plaintiff, which does not inform us upon what consideration, if any, that agreement was made; if it was for a sufficient consideration, and binding upon the plaintiff so as to restrain him from bringing suit, the defendant was thereby discharged from his liability as endorser; an agreement to receive the amount of the bill by instalments being clearly an agreement to give time; but if on the contrary it was for want of consideration *nudum pactum*, and not obligatory upon the plaintiff, his remedy was not suspended, and the endorser therefore was not discharged. And in the absence of proof of any consideration to support it, we think the Court before whom the cause was tried, erred in the unqualified instruction to the jury, that the defendant was discharged from all liability.

Judgment reversed, and procedendo awarded.

IGLEHART *vs.* STATE, use MACKUBIN.—June, 1830.

G. obtained judgment by confession against W. as executor, who thereupon stayed execution by a writ of error and bond. While the case was pending in the Appellate Court, the executor died, and the writ of error was abated. The executor, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *d. b. n.* of the first deceased, did not find assets sufficient to discharge the debt. In an action upon W's testamentary bond, against his surety, for the use of G.

a replication disclosing the above facts, was held sufficient on general demurrer and a compliance with the Act of 1720, ch. 24.

In this case the defendant rejoined, "that the said executor had no goods or chattels which were of the deceased testator, at the time of his death in his hands to be administered, nor had at any time thereafter:" Held, on demurrer, that this rejoinder could not be received as a general plea, extending over the whole time from the death of the testator to the death of the executor, that no goods of the deceased ever came to the executor's * hands; for its relative expressions "nor at any time thereafter" evidently indicated a particular point of time, when 236 the executor was without goods or chattels with which to pay the debt, as they implied a period of time when he had such goods and chattels—that it could only be considered as a plea of *plene administravit*, or a substitute for such a plea, and as such, it was materially defective.

Upon general demurrer, it is the duty of the Court to look to, and adjudicate upon all the pleadings in the cause.

The confession of a judgment by an executor is conclusive on him, as well as to the debt confessed, as to the sufficiency of the assets to pay it; but in relation to his surety, in his testamentary bond, it is only *prima facie* evidence, either as to the debt, or sufficiency of assets to pay it. (a)

ERROR to Anne Arundel County Court. This was an action of debt instituted on the 4th day of September, 1823, in the name of the State, use of George Mackubin, on the testamentary bond of William Warfield, executor of Thomas Warfield, bearing date on the 5th of April, 1819, against the appellant, James Iglehart, Junior, one of the securities in said bond. To the plea of general performance by the defendant, the plaintiff filed the following replication: "for plea nevertheless by way of replication, the said State saith, that at a County Court of Anne Arundel County, begun, &c. on the 3d Monday of April, 1822, the said George Mackubin, named in the endorsement of the original writ in this cause, at whose instance and for whose use the same was impetrated, by judgment of the said Court, recovered by confession against the said William Warfield, by the name of William Warfield, late of said county, merchant, executor of the testament and last will of Thomas Warfield, deceased, as well the sum of \$11,313.50, a certain debt, as the sum of \$6.52, as for his costs and charges by him about his suit, in that behalf laid out and expended, to be levied of the goods and chattels which were of the said Thomas at the time of his death, in the hands of the said William, remaining to be administered, if so much thereof in the hands of the said William to be administered he had, and if so much thereof in his hands to be administered he had not, then the costs and charges * aforesaid to be levied of the proper goods and chattels of the said William Warfield; and the said George 237

(a) Approved in *Beall vs. Osbourn*, 30 Md. 11, and *Roberts vs. Mattress Co.* 46 Md. 385. Distinguished in *Griffith vs. Turner*, 4 Gill, 114, and *McClellan vs. Kennedy*, 8 Md. 252. Cited in *Owens vs. Collinson*, 3 G. & J. 35, and *Dent vs. Maddox*, 4 Md. 580. See *Beall vs. Beck*, 8 H. & McH. 156, note.

it, and thus become entitled to a remedy on the instrument, against all the antecedent parties. So in the case of a naked agreement by the holder to give time, which being void for want of consideration, is not binding upon him, and does not suspend the rights or remedies of any of the parties. And being therefore no more to the prejudice, and not affecting the rights of the endorser, more than a mere forbearance by the holder to sue, without any express agreement, there is no reason why the endorser should be discharged in one case, more than in the other. But not so in the case of a valid agreement for delay, having a sufficient consideration to support it; which being binding on the holder suspends his remedy on the bill, until the expiration of the time agreed upon. And if in the meantime the endorser discharges the bill, he only places himself in the situation of the holder, with no other rights, and he takes the bill subject to all the equity of the drawer, as against the holder himself, whilst it was in his hands, whose right to sue was suspended by the agreement. Such an engagement therefore does injuriously affect the rights of the endorser, and discharges him from his liability, if made without his concurrence. The only evidence in the record

235

* in this case, touching the agreement relied upon by the defendant, between the plaintiff and Tongue, the drawer, for an extension of credit, is that which is furnished by the letter of the cashier of the plaintiff, which does not inform us upon what consideration, if any, that agreement was made; if it was for a sufficient consideration, and binding upon the plaintiff so as to restrain him from bringing suit, the defendant was thereby discharged from his liability as endorser; an agreement to receive the amount of the bill by instalments being clearly an agreement to give time; but if on the contrary it was for want of consideration *nudum pactum*, and not obligatory upon the plaintiff, his remedy was not suspended, and the endorser therefore was not discharged. And in the absence of proof of any consideration to support it, we think the Court before whom the cause was tried, erred in the unqualified instruction to the jury, that the defendant was discharged from all liability.

Judgment reversed, and procedendo awarded.

IGLEHART *vs.* STATE, use MACKUBIN.—June, 1830.

G. obtained judgment by confession against W. as executor, who thereupon stayed execution by a writ of error and bond. While the case was pending in the Appellate Court, the executor died, and the writ of error was abated. The executor, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *d. b. n.* of the first deceased, did not find assets sufficient to discharge the debt. In an action upon W's testamentary bond, against his surety, for the use of G.

a replication disclosing the above facts, was held sufficient on general demurrer and a compliance with the Act of 1720, ch. 24.

In this case the defendant rejoined, "that the said executor had no goods or chattels which were of the deceased testator, at the time of his death in his hands to be administered, nor had at any time thereafter:" Held, on demurrer, that this rejoinder could not be received as a general plea, extending over the whole time from the death of the testator to the death of the executor, that no goods of the deceased ever came to the executor's hands; for its relative expressions "nor at any time thereafter" evidently indicated a particular point of time, when the executor was without goods or chattels with which to pay the debt, as they implied a period of time when he had such goods and chattels—that it could only be considered as a plea of *plene administravit*, or a substitute for such a plea, and as such, it was materially defective.

Upon general demurrer, it is the duty of the Court to look to, and adjudicate upon all the pleadings in the cause.

The confession of a judgment by an executor is conclusive on him, as well as to the debt confessed, as to the sufficiency of the assets to pay it; but in relation to his surety, in his testamentary bond, it is only *prima facie* evidence, either as to the debt, or sufficiency of assets to pay it. (a)

ERROR to Anne Arundel County Court. This was an action of debt instituted on the 4th day of September, 1823, in the name of the State, use of George Mackubin, on the testamentary bond of William Warfield, executor of Thomas Warfield, bearing date on the 5th of April, 1819, against the appellant, James Iglehart, Junior, one of the securities in said bond. To the plea of general performance by the defendant, the plaintiff filed the following replication: "for plea nevertheless by way of replication, the said State saith, that at a County Court of Anne Arundel County, begun, &c. on the 3d Monday of April, 1822, the said George Mackubin, named in the endorsement of the original writ in this cause, at whose instance and for whose use the same was impetrated, by judgment of the said Court, recovered by confession against the said William Warfield, by the name of William Warfield, late of said county, merchant, executor of the testament and last will of Thomas Warfield, deceased, as well the sum of \$11,313.50, a certain debt, as the sum of \$6.52, as for his costs and charges by him about his suit, in that behalf laid out and expended, to be levied of the goods and chattels which were of the said Thomas at the time of his death, in the hands of the said William, remaining to be administered, if so much thereof in the hands of the said William to be administered he had, and if so much thereof in his hands to be administered he had not, then the costs and charges * aforesaid to be levied of the proper goods and chattels of the said William Warfield; and the said George **237**

(a) Approved in *Beall vs. Osbourn*, 30 Md. 11, and *Roberts vs. Mattress Co.* 46 Md. 385. Distinguished in *Griffith vs. Turner*, 4 Gill, 114, and *McClellan vs. Kennedy*, 8 Md. 252. Cited in *Owens vs. Collinson*, 3 G. & J. 35, and *Dent vs. Maddox*, 4 Md. 580. See *Beall vs. Beck*, 3 H. & McH. 156, note.

Mackubin did then and there agree to release the said judgment, upon the payment of the sum of \$5,656.75, current money, with interest thereon from the 19th day of November, 1818, and the said costs; as by the record and proceedings of the said Court now remaining at the City of Annapolis, aforesaid, manifestly appears, which said judgment, in form aforesaid rendered, was for a just and *bona fide* debt, due to the said George Mackubin by the said Thomas Warfield, in his life-time, and then and not yet being paid or in any manner satisfied; and the said judgment still remains in full force and effect, no ways reversed or annulled. And that after the death of the said Thomas, and at the time of rendering the said judgment, the said William as executor as aforesaid, had of the goods and chattels which were of the said Thomas at the time of his death, in his hands to be administered, to the value of the debt, costs and charges aforesaid, in the said judgment and release thereof mentioned, wherewith the said William, executor as aforesaid, the said debt costs, and charges aforesaid, could have satisfied, to wit, at Anne Arundel County aforesaid. And the said State further saith, that after the rendition of the said judgment, to wit: on the 28th day of June, 1822, the said William Warfield, for reversing the said judgment, prosecuted and sued forth out of the High Court of Chancery of this State, a certain writ of the State, for correcting errors in the record and process, and also in the rendition of the said judgment, directed to the Judges of Anne Arundel County Court aforesaid. By which said writ the said Judges of the said County Court were commanded, that if judgment be thereof rendered, that then the record and process of the said plea, with all things touching the same, under their seals distinctly and openly they send, and that writ, so that the same might be had before the Judges of the Court of Appeals for the Western Shore, to be held at the City of Annapolis, on the first Monday of December, then * next, that

238 the record and process aforesaid being inspected into, the Judges of the Court of Appeals might further do therein for the correcting of that error, which of right and according to the laws and customs of this State ought to be done. And the said William Warfield, immediately on suing out the said writ of error as aforesaid, entered into bond with sufficient sureties approved by the Chancellor in double the sum recovered by the said judgment, with a condition "that if the said William Warfield should not pursue the directions of the Act entitled, 'An Act for regulating writs of error, and granting appeals from and to the Courts of common law within this Province,' at the next Court of Appeals for the Western Shore, and prosecute the same writ with effect, and also satisfy and pay, to the said George Mackubin, his executors, administrators and assigns, in case the said judgment should be affirmed, as well all and singular the debt, damages and costs adjudged by the said County Court, as also all costs and damages that should be awarded by the said Court

of Appeals, then that the said bond should be and remain in full force and virtue, otherwise of no effect." By virtue of which said writ of error the said Judges of the said County Court here, afterwards to wit, on the said 8th day of June, 1822, transmitted the record and process of the plea and judgment aforesaid, with all things touching the same, unto the Judges of the said Court of Appeals at the City of Annapolis aforesaid. After which, and before the said judgment was affirmed by the said Court of Appeals, the said William Warfield died, and such proceedings were had on the said record in the said Court of Appeals, that at June Term, 1823, of the said Court, the said William Warfield's death was suggested, and the said writ of error abated, and was entered abated, as by the said record and proceedings in the said Court of Appeals remaining, more fully appears. And the said State further saith, that after the death of the said William Warfield, to wit, on the 24th day of January, 1823, administration of all and singular the goods and chattels, rights and credits which * were of the said Thomas Warfield at the time of his death, left **239** unadministered by the said William Warfield, deceased, executor as aforesaid, was by the Orphans' Court of Anne Arundel County, in due form of law granted to the said James Iglehart, Jun. and one David Ridgely of the county aforesaid; who on the 11th day of March, 1823, at the county aforesaid sold, and returned to the said Orphans' Court in due form of law an account of their sales of all the goods, chattels and personal estate of the said Thomas Warfield, left unadministered by the said William Warfield, deceased, executor as aforesaid, which came to their hands to be administered, amounting to the sum of \$71.74½, which said sum is not sufficient to pay to the said George Mackubin the said sum of \$5,656.75, current money, with interest thereon from the 19th day of November, 1818, and the said sum of \$6.52 costs, in the said judgment, and the release thereof mentioned. And the said State further saith, that after the death of the said William Warfield, to wit: on the 2nd day of November, 1822, administration of all and singular the goods and chattels, rights and credits which were of the said William Warfield, deceased, at the time of his death, was, by the Orphans' Court of Anne Arundel County, granted to a certain John W. Duvall of the county aforesaid; who, on the 12th day of November, 1822, returned to the said Orphans' Court in due form of law, an inventory of the goods, chattels and personal estate of the said William Warfield, amounting to the sum of \$5,943.62½, and an additional inventory amounting to the sum of \$489.33, and on the 3rd day of March, 1823, an account of the sales of all the said goods, chattels and personal estate, amounting to the sum of \$5,855.79; and on the 9th day of April, 1824, duly returned to the said Court a list of debts due from the said William Warfield, amounting to the sum of \$12,420.96, and the said State saith that the amount of the said sales, and of all the goods and

chattels, rights and credits, and personal estate, which were of the said William Warfield at the time of his death, are * not sufficient to discharge and pay to the said George Mackubin, the said sum of \$5,656.75, current money, with interest thereon from the said 19th day of November, 1818, and the said sum of \$6.52, costs in the said judgment, and the release thereof mentioned, and also to discharge and pay the other debts due from the said William Warfield at the time of his death. And the said State further says, that execution of the judgment aforesaid, yet remains to be made to the said George Mackubin. Nevertheless the said William Warfield, as executor as aforesaid, although often thereunto requested, by the said George Mackubin, hath not yet paid or satisfied to the said George Mackubin, the debt, damages, costs and charges aforesaid, in the judgment aforesaid mentioned; but hath altogether refused to pay the same to the said George Mackubin. And so the said State says, that the said William Warfield, executor as aforesaid, hath not paid the debts of the said Thomas Warfield, which he did owe at the time of his death, so far forth as the goods, chattels and credits, which were of the said Thomas Warfield at the time of his death, would extend, and the law would charge, as he ought to have done, but hath wasted and misapplied the same, contrary to the form of the condition of the writing obligatory aforesaid; and this the said State is ready to verify, &c. Wherefore, &c.”

To this replication the defendant rejoined as follows:

“And the said James Iglehart, Jr. comes, &c. and as to the replication of the said State he saith, that the said State ought not, &c. because he the said James saith, that the said William Warfield in the condition of the writing obligatory mentioned, had no goods or chattels which were of the said Thomas Warfield, at the time of his death, in his hands to be administered, nor had at any time thereafter, and this he is ready to verify. Wherefore he prays judgment, &c.” General demurrer by the plaintiff to the defendant’s rejoinder, and joinder in demurrer. The County Court ruled the demurrer good, and rendered judgment for the plaintiff. Whereupon the defendant sued out the present writ of error.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Magruder and Shaw, for the appellant, cited *Drummond vs. Prestman*, 12 Wheat. 515; 2 Bro. Ch. 610; 2 Chitty Plea. 592; 1 Saund. 219, (B) note 8; Acts of 1820, ch. 24—1802, ch. 101, sec. 1—1806, ch. 90—1815, ch. 149; *Seegar vs. The State*, 5 H. & J. 488; *Quynn vs. The State*, 1 H. & J. 37; *M’Mecken vs. Mayor of Baltimore*, 2 H. & J. 41; *Johnson vs. State*, 3 H. & McH. 223; *Beall vs. Beck*, *Ib.* 242; 1 Com. Dig. 215; 3 Stark. Ev. 1387, note (3); *Ib.* 1300; 1 Phil. Ev. 242, 248; *Drummond vs. Prestman*, 12 Wheat. 515.

Taney (Att'y-Gen'l) and *Brewer, Jr.* for the appellee, cited 2 *Saund.* 216, note (1;) Act of 1820, ch. 24; 2 *Chitty Plea.* 451; the Act of 1802, ch. 101, sec. 1; 1 *Saund.* 219, (A,) note (8) (C;) *Erving vs. Peters*, 3 *Term Rep.* 685.

* EARLE, J. delivered the opinion of the Court. The controversy between these parties, arises from an action by the appellee against the appellant, as a surety in the testamentary bond of William Warfield, executor of Thomas Warfield, to recover the amount of a judgment obtained against the executor. The judgment was appealed from, and pending the appeal the executor died, not leaving sufficient estate to pay his debts. All this matter is set forth at large in the replication, as well as an administration *de bonis non*, on the unadministered estate of Thomas Warfield, which amounted to a very trifling sum, wholly inadequate to the payment of the appellee's judgment. To this replication the defendant, now the appellant, put in a rejoinder, (*ante* 240) which drew from the adversary pleader a general demurrer, and its legal sufficiency is the first question to be decided by this Court. This rejoinder is clearly not to be received as a general plea of *nulla bona devenierint ad manus*, extending over the whole time from the death of the testator to the death of the executor for its relative expressions, "nor at any time thereafter," evidently indicate a particular point of time, when the executor was without goods or chattels with which to pay the debt, as they imply a period of time, when he had such goods and chattels. We can consider it only as a plea of *plene administravit*, or a substitute for such a plea, and so considering it, the plea appears to us to be materially defective. The point of time, when the executor was without goods or chattels to answer the demand against him is not specified, and is left in uncertainty and doubt; and the plea omits the words "and that he had not any goods or chattels of the testator, on the day of issuing out of the original writ, or ever after," which words are essential, and without which, it is bad on demurrer. 2 *Saund. Rep.* 216, note 1. A general demurrer having been put in to the rejoinder, it became the duty of the Court below, to look to, and adjudicate upon all the prior pleadings in the cause, and presuming they did so, we proceed in the next place to examine the replication * in the record, and give our ideas of it. The matter of this plea is ample, comprising all that is made requisite by the Act of 1720, ch. 24, with which we have carefully compared it; and it appears also to us to be well pleaded. The *feri facias* was arrested by the appeal, and no return of course was made of *nulla bona*, but its equivalent is fully stated, and satisfactorily demonstrates, that the creditor was remediless by any other reasonable means, save that of suing the testamentary bond. Our judgment must consequently be in affirmance of the judgment of Anne Arundel County Court; yet before we leave the case, we think

it right in a short way to express our opinion on a point argued before us, which is closely connected with this subject, and is interesting to the public to be settled. The confession of a judgment by an executor is conclusive on him, as well as to the debt confessed, as to the sufficiency of the assets to pay it; but what legal effect it has on the rights of his surety, in the testamentary bond, is the question to be solved? Not being a party to the judgment, he cannot be concluded by it, although his liabilities depend on the acts and confessions of his principal. It seems to us, therefore, that in determining his rights, the judgment against the executor, ought to be considered to have but a *prima facie* influence, either as to the debt recovered, or the sufficiency of the assets to pay it. As to him it is nothing more than the declarations or confessions of the principal, clothed with legal solemnities, and should only be deemed in all respects correct, until the contrary is made to appear. This opinion is in accordance with *Drummond vs. Prestman*, 12 *Wheat.* 519, and apparently so, with a case there cited, from 15 *Massa. Rep.* 6, which book unfortunately we have been unable to procure. It is opposed, however, to *Beall vs. Beck*, 3 *H. & McH.* 242; unless that case is to be understood, as construed by the Supreme Court of the United States in *Drummond vs. Prestman*, in which sense we acknowledge its authority.

Judgment affirmed.

246 * THE STATE OF MARYLAND vs. SCRIBNER, and STATE vs. BARKER.—June, 1830.

By the Act of 1826, ch. 251, declaring that "It shall not be lawful for any person within this State, to have in possession any ticket of any lottery, not granted or permitted by this State, with intent to sell, negotiate or dispose of the same, to sell, negotiate, or advertise in anyway whatever, any such ticket or part of a ticket, &c." it was the great object of the Legislature to prevent the sale of unauthorized tickets, and for that purpose the law prohibited both the possession of such tickets with intent to sell, and the selling of them; *Held*, therefore, that the word "such," did not refer to the possession of the seller, as part of the description of the ticket which would be unlawful to sell, for that would legalize the selling of tickets by any person, who at the time of the sale had not possession, and defeat the obvious intent of the law.

In an indictment under the above Act of Assembly, the lottery ticket or part of a ticket should be set out—the sale of only such tickets, as are not authorized by the State, is prohibited, and it would be proper that the ticket should be set out, that the Court might see whether it were a ticket, the sale of which was authorized or prohibited.

In all cases of larceny, very particular descriptions of the goods taken have never been considered necessary, and the description given in the law which enacts the offence in statutable larcenies, has in general been deemed sufficient—this doctrine is founded partly on the fact that the prosecutor is not considered as in the possession of the article stolen, and

is not, therefore, enabled to give a minute description; and principally because, notwithstanding the general description, it is made certain to the Court from the face of the indictment, that a crime has been committed, if the facts be true.

ERROR to Baltimore City Court. The indictment in the first case stated, "that Samuel Scribner, late of the said City, a dealer in lottery tickets, on the 7th day of May, in the year 1828, with, &c. at, &c. did sell to a certain Nathaniel F. Downing, within this State, a certain ticket, being then and there part of a lottery ticket of a certain lottery, then and there called the Union Canal Lottery, fourth class, for 1828, and then and there numbered 11, 25 and 33, and which said lottery was not then and there of a lottery granted, or authorized by this State, contrary to the form of the Act of Assembly in * such case, made and provided, and against the peace, government and dignity of the State." The second count stated **247** "that the said Samuel Scribner, late of, &c. on the 7th day of May, in the year 1828, with, &c. at, &c., did negotiate with a certain Nathaniel F. Downing, one-quarter ticket of a certain lottery, called the Union Canal Lottery, fourth class, for the year 1828, which said quarter ticket, was then and there a part of a lottery ticket, of the lottery aforesaid, numbered 11, 25 and 33, and was then and there of a lottery not granted, or authorized by this State, contrary, &c." Third count, "that the said Samuel Scribner, late, &c. on the 7th day of May, 1828, with, &c. at, &c. was concerned with a certain other person, to the jurors unknown, in negotiating a part of a ticket, to wit, one-quarter of the ticket, numbered 11, 25 and 33, of a certain lottery, then and there called the Union Canal Lottery, fourth class, for the year 1828, which said lottery then and there was not granted or authorized by this State, contrary, &c." The defendant pleaded not guilty, and there was a special verdict which stated the facts of the case, but which need not be repeated here, further than that the paper sold by Scribner was as follows: "*E Pluribus Unum*, No. 1, Policy of Insurance—Sir, please transfer to order of —, that part of the policy of insurance of No. 1, effected at your office, on my account, which relates to, and insures the payment of such prize as may be drawn to quarter 11, 25, 33, as therein named, in Union Canal Lottery, 4th class, for 1828. S. Scribner, 182. D. D. ARDEN, Washington City."

A motion was then made, on behalf of the said Scribner, in arrest of judgment, which stated among other reasons, that the writing charged to be negotiated by the traverser, and that given in evidence to the jury, are neither of them set forth in the indictment, and because the indictment does not charge the lottery ticket, or part of a lottery ticket therein mentioned, to have been in the possession of the traverser, nor is there any such fact found by the jury.

*The City Court, (BRICE, C. J., M'MECHEN and NISBET, **248** A. J.) sustained the motion in arrest.

The indictment in the second case charged "that Ephraim Barker, late of the city aforesaid, a dealer in lottery tickets, on the 26th of May, in the year 1828, with, &c. at, &c. did sell to a certain Nathaniel F. Downing, within this State, a certain ticket, being then and there part of a lottery ticket, of a certain lottery, then and there called the Grand Consolidated Lottery, sixth class, for the year 1828, and then and there numbered 26, 39 and 44, and was then and there of a lottery not granted, or authorized by the laws of this State, contrary to the form of the Act of Assembly, in such case made and provided, and against the peace, government, and dignity of the State." The second count charged "that the said Ephraim Barker, late, &c. on the 26th day of May, 1828, with, &c. at, &c. did negotiate with a certain Nathaniel F. Downing, one-quarter ticket of a certain lottery, called the Grand Consolidated Lottery, sixth class, for the year 1828, which said quarter ticket, was then and there part of a lottery ticket of the lottery aforesaid, numbered 26, 39, 44, and was then and there of a lottery not granted or authorized by this State, contrary, &c." concluding as the first count. Third count, "that the said Ephraim Barker, late, &c. on the 26th day of May, 1828, with, &c. at, &c. was concerned with a certain other person, to the jurors unknown, in negotiating a part of a lottery ticket, to wit: one-quarter of the ticket numbered 26, 39, 44, of a certain lottery, then and there called, the Grand Consolidated Lottery, sixth class, for the year 1828, which said Lottery, was not then and there authorized, or granted by this State, contrary," &c. concluding as the first count.

To this indictment the defendant, Barker, demurred, and the City Court ruled the demurrer good, whereupon, the present writs of error were sued out by the State.

These causes came on to be argued together, before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

Taney, (Attorney-General,) and *Gill*, for the State, cited 5 *Wheat.* 76, 94, 96; *Cox Digest*, 641, sec. 32, 33; Act of 1819, ch. 163; 2 *H. & G.* 407; *U. States vs. Gooding*, 12 *Wheat.* 474, 476; the Act of 1809, ch. 138, sec. 6; 1 *Stark. Ev.* 217.

Mitchell and Gwinn, for the defendants in error, cited *U. States vs. Gooding*, 12 *Wheat.* 476; *King vs. Munoz*, 2 *Strange*, 1127; 1 *East P. Crown*, 453; 1 *Hale*, 660; 2 *Leach*, 890; 2 *East P. C.* 601, 600; 1 *Stark. C. Law*, 143, 144; 2 *East P. C.* 1114; 2 *Maul. and Selw.* 386; 1 *Leach*, 377; *Davy vs. Baker*, 4 *Burr.* 2471; Act of 1809, ch. 154; 1826, ch. 228; 3 *Barn. and Cress.* 183; 1 *Black. Com.* 88; 1 *Chitty C. Law*, 198; the Act of 1828, ch. 129, sec. 16; and 1826, ch. 67.

251 * ARCHER, J. delivered the opinion of the Court. We conceive that there cannot be a reasonable doubt about the construction of the Act upon which these indictments are framed. They are founded upon the Act of 1826, ch. 251, which is as follows: "It

shall not be lawful for any person within this State, from and after the passage of this Act, to have in possession any ticket, of any lottery, not granted or permitted by this State, with intent to sell, negotiate, or dispose of the same, to sell, negotiate or advertise, in any way whatever, any such ticket, or part of a ticket, or in any way or manner, or as an agent, factor, broker, or attorney, for or on behalf of any other person, or persons, to aid, assist, or in any way to have any concern, with any other person in selling any ticket, in any lottery, not granted or authorized by this State." The great object of the Legislature was to prohibit the sale of unauthorized tickets, and for that purpose the law prohibits both the possession of such tickets with intent to sell, and the selling of them. To give such an interpretation to the law as would make the word "such" refer to the possession of the seller, as part of the description of the ticket, which it should be unlawful to sell, would legalize the selling of tickets by any person, who at the time of sale had not the possession. Such an interpretation would defeat the obvious intent of the law. The phraseology of the law, although its construction (being a criminal law) must be strict, does not demand such an interpretation. By the use of the word "such," it was intended to refer to that which had been previously described—a ticket in a lottery not granted or permitted—that it should be in possession of the seller is no part of the description of the ticket, and the word "such," does not refer to the possession, and it is not therefore necessary to charge the fact of possession in an indictment which makes the sale the alleged offence.

But we conceive that the lottery ticket, or part of a ticket, should be set out in the indictment. It must be recollected that the sale of all lottery tickets are not prohibited by law; * it is only the sale of such as are not authorized by the State; and it would **252** be proper that the ticket should be set out, that the Court might see whether it was a ticket, the sale of which was authorized or prohibited. It has been supposed that there can be no greater reason for setting out the lottery ticket in such cases as these, than there would be to set out a bank note in the case of an indictment for larceny of a bank note; but such cases appeared to stand on peculiar grounds. In all cases of larceny, very particular descriptions of the goods taken, have never been considered necessary; and the description given in the law which creates the offence, has in general been deemed sufficient. If one be indicted for stealing a handkerchief, it will not be necessary to describe either its dimensions, or its color; or if he be indicted for stealing a piece of cloth, it would not be necessary to give its length, breadth, or color; and this doctrine is founded in part, probably on the fact, that the prosecutor is not considered as in possession of the article, and is not therefore enabled to give a minute and particular description. But in the case before the Court, the presumption of possession would be the reverse, and

there would be no inability, or difficulty, to give a minute description, or to set out the instrument.

But the principal reason upon which this law in relation to indictments for larceny is founded, is because, notwithstanding this general description, it is made certain to the Court, from the face of the indictment, that a crime has been committed, if the facts be true. As in the case put of a larceny of bank notes, it is punishable to steal the note of any bank. The crime therefore appears complete, be it the note of what bank it may—so in the other cases put, a crime appears upon the face of the indictment, if the allegation that a handkerchief, or piece of cloth has been stolen, be true, without any other description, for be its kind what it may, it is equally a felony. But had the statute made it felony to steal the note of a particular bank, it would perhaps, notwithstanding the difficulty in
253 general, of giving * a particular description of any stolen article, have been necessary to have set it out, in order that the Court might see whether it was a note of such a description, that a larceny of it might be committed.

These principles will be found to be applicable to all offences, created by statute, where it does not contain a complete description of the offence. As in cases where the counterfeiting of certain instruments is made forgery. The instrument is set out that the Court may see whether it is within the statute. So also where frauds by means of false tokens and false pretences are punishable, as there are false tokens, and false pretences not punishable, it is demanded that the particular tokens and pretences be set out, that the Court may see whether the offence is brought within the statute. And the same doctrines are applicable to indictments, under the statute of 9 Geo. 1, ch. 22, for sending menacing letters. The letters must be set out. Now applying these principles to the cases before the Court, for anything that appears to the Court upon the face of these indictments, the tickets there referred to may have been authorized by the State. It is true, that there is an averment that they are unauthorized, but this will not be sufficient. The tickets must be spread out, that the Court may perceive whether they be authorized or not; for if this sweeping averment were received, that which is matter of law would be given to the determination of the jury.

Judgments affirmed.

254 * THE STATE OF MARYLAND *vs.* WAYMAN, and WAYMAN
vs. THE STATE.—Cross-Appeals.—June, 1830.

All appointments to office, under the Constitution, by the executive of the State, are made by the authority of the 40th, 48th and 49th sections, and the Register in Chancery not being commissioned during good behavior, is necessarily an officer of annual appointment, under the 49th section.

The tenure of his office being limited, he cannot continue to act after his term expires, except in the single instance of the appointment of a successor, in which case he may act until such successor, commissioned in his stead, is qualified. If re-appointed, he may continue to act without any new commission or qualification, but unless re-appointed he is not legally an incumbent of the office, and cannot lawfully perform any of its duties.

Where the Constitution limits the duration of an officer to a certain term, no irregularities in the proceedings of the appointing power, can extend it beyond that period.

By the 49th Article of the Constitution of Maryland, "all civil officers of the the appointment of the Governor and Council, who do not hold commissions during good behavior, shall be appointed annually in the third week in November; but if any of them shall be re-appointed, they may continue to act without any new commission or qualification: and every officer though not re-appointed shall continue to act until the person who shall be appointed and commissioned in his stead shall be qualified."

Under this clause, B. was commissioned as Register in Chancery, in January, 1812, and gave bond on the 24th January, 1816, in conformity to the Act of 1742, ch. 10, the condition of which was such, that "if above bounden B. whilst he shall continue in the office of Register, shall," &c. discharge various enumerated duties, and that in case of death, or that he shall be legally dismissed from officiating longer in the said office, he or his executors, &c. shall surrender to his successor all the records, &c. "made during the time he hath officiated in the said Register's Office." He continued to hold the office and discharge its duties without any re-appointment, until 1821, and omitted to record proceedings and decrees of the Court, of which it was his duty to keep records, during every year he was in office. These records were afterwards completed at the public expense, and an action was brought on his bond against his security, to recover the money expended by the State: *Held*, that the bond was executed with an express reference to the provisions of the Constitution, and that its condition did not create a responsibility beyond them; that its object was to engage for a faithful discharge of duties as long as they could be legitimately performed under the official grant and no longer, and that the defendant was responsible under the bond for the conduct of B. as Register of the Court of Chancery, to the expiration of the third week in November, 1816.

* A recital in the condition of a bond may restrain indefinite expressions used in it, and adapt them to the intention of the parties. **255**

Where a surety is sued upon a bond, the utmost that can be recovered is the penalty, and legal interest thereon, by way of damages for the detention of the debt from the time the debt is demanded—that is the import and effect of his contract, and his accountability cannot be stretched beyond it.

It is not in every case that interest by way of damages is to be recovered on the penalty, and when the case occurs, it may be considered as an exception to the general rule, which limits the recovery by the penalty in the bond.

Where a jury is called upon to assess the damages for breaches assigned or proved in the condition of a collateral bond, and are wholly unauthorized by the issue to find damages for the detention of the debt, a recovery must be limited to the penalty of the bond.

Where various persons have distinct demands secured by the same bond, a recovery and payment in one suit can be no bar to other actions, in which the several claimants may recover to the same extent, and can only be limited by the penalty, and in particular cases by the penalty and interest.

In an action upon the official bond of the Register of the Court of Chancery by the State, for omitting to make the proper record books, a recovery may be had for omission to record proceedings in suits to which the State was not a party, and on account of which nothing was paid to such register by the State. The measure of damages is the sum paid by the State for doing that, which the officer should have done.

The records of our Courts of justice are to be considered as public property, and so important is it to the community, that they should be made up correctly, and preserved with care, that when a neglect in these particulars occurs, an obligation is imposed on the State to supply the defect, and have the work done at the expense of the treasury. The defaults of the officers, are thus visited on the public, and their bonds afford the only means of security for the State to resort to against loss.

Evidence which leaves the mind in doubt, whether by a further search, certain record books sought for, might not have been regained, is not sufficient to let in parol evidence of their contents. (a)

Where it was the duty of the Register in Chancery to make and keep records of the proceedings of his Court, his report to the Chancellor that he had made such records, and the statement of the Chancellor on the minutes of the Court, that such records had been made up, do not constitute primary evidence to shew that such records were made, and in the absence of satisfactory proof of the loss of the record books themselves, are not admissible as secondary evidence of the same fact, nor is the estimate of a subsequent Register, made by the direction of the Legislature, of the sum it would require to furnish a substitute for such record books, nor his evidence that the same had been all correctly made up, admissible under such circumstances.

256 * The Constitution is to be construed with reference to the laws existing at its adoption, and the practice under them. (b)

APPEAL from Anne Arundel County Court. This was an action of debt, brought on the 23d of September, 1825, in the name of the State of Maryland, against Henry Wayman, on the following bond, which was duly certified by the Clerk of the Court of Appeals, to be a true copy from the original on file in his office. The defendant pleaded general performance—replication, non-performance and issue.

“*Maryland, scit.* Know all men by these presents, that we, Thomas Hamilton Bowie, Jesse Ray, Francis T. Clements and Henry Wayman, of Anne Arundel County, are held and firmly bound unto the State of Maryland, in the full and just sum of two thousand six hundred and sixty-six dollars and sixty-six cents and two-thirds of a cent, current money, to be paid to the said State of Maryland. To the which payment well and truly to be made and done, we bind ourselves, our and each of our heirs, executors and administrators,

(a) Approved in *Glenn vs. Rogers*, 3 Md. 321.

(b) Cited in *Baltimore vs. State*, 15 Md. 458.

jointly and severally, firmly by these presents. Sealed with our seals, dated this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and sixteen. The condition of the above obligation is such, that if the above bounden Thomas Hamilton Bowie, whilst he shall continue in the office of Register of the Court of Chancery, shall, at his own proper cost and charge, find a supply of good and sufficient record books necessary for the entering up of all matters and things relating to such Register of the Court of Chancery office, and shall and will make or cause to be made and entered, true, legal and perfect records and entries, according to the truth and nature of the matter or thing requiring to be entered or recorded—and shall duly and carefully look after, sustain, preserve, repair and maintain, all the several books, papers and records now being and remaining in the said office, as also those that from time to time during his continuance in the said office shall be added thereunto, in such manner as * that in case of death, or that he shall be legally dismissed from officiating longer in the said 257 office, he the said Thomas Hamilton Bowie, his executors or administrators, shall surrender and deliver up, or cause to be surrendered and delivered up to the next person who shall succeed him in the said Court of Chancery or Register's office, all the papers and record books now being in the said Register's office, in good order and repair; as also all such other papers and record books, which shall be by him added in like good order and repair, with the records and entries faithfully, legally, and truly made up and entered during the time he hath officiated in the said Register's office; without favor or affection, but according to the truth, the nature of the thing and the duty of his office, and all other the duties of his said office legally, duly and faithfully discharge, according to law, and the true intent and meaning of the Acts of Assembly in such cases made and provided—that then the above obligation to be void and of none effect, or else to be and remain in full force and virtue in law.”

1st Exception.—The plaintiff proved that Thomas H. Bowie, the obligor in the condition of the writing obligatory mentioned, was duly appointed and commissioned as Register in Chancery on the 23d January, 1816, and continued to hold the said office and discharge the duties thereof, without any re-appointment, until the — day of 1821. That he received no other appointment to the said office, except the one above mentioned, and continued until his death to hold and exercise the said office, under the aforesaid appointment. That in 1816, and every other year after he received his said appointment until his death, he omitted to record proceedings and decrees which it was the duty of the Register of the Court of Chancery for the time being, by law, to record, and nevertheless sent out and collected and received his fees for recording proceedings which never were recorded by him, and which have since been recorded by the

258 State at the public expense, and for which * the State has paid between \$5,000 and \$6,000. That the amount of fees improperly charged and received by the said Bowie, during the time he so held the office, amounted to the sum of about one thousand pounds current money. Whereupon the plaintiff prayed the opinion of the Court, that the plaintiff is entitled to recover in this action, for the failure of the said Thomas H. Bowie, to record all proceedings from the date of his said bond to the time of his death, which it was the duty of the Register of the said Court, for the time being, to record. 1st. Because under the appointment above mentioned, he was lawfully the Register of the said Court until his death, without any new appointment, and the bond in question therefore continued in force until his death. 2d. Because the condition of the said bond, by its terms, covers the whole time he continued in office under the original appointment, or a succession of annual appointments. 3d. Because the condition is broken, if all the papers and record books which were by him added while he held the office, in manner above mentioned, were not at his death in good order and repair, with the records and entries for all that time, faithfully, truly, and legally made up and entered—which opinion and direction the Court [DORSEY, C. J., KILGOUR and WILKINSON, A. J.] refused to give—but were of opinion, and so directed the jury, that the defendant in this cause cannot be charged with any such alleged default of the said Thomas H. Bowie, arising subsequently to the expiration of the third week in November, in the year 1816. The plaintiff excepted.

2d Exception.—In addition to the evidence stated in the first bill of exception, the plaintiff offered in evidence, that the State had sustained damage to the amount of more than \$4,000, by the default of the said Thomas H. Bowie, as Register in Chancery, committed before the end of the third week in November, 1816; and thereupon the plaintiff prayed the opinion and direction of the Court to the jury, that if they find, from the evidence, that the State has sus-

259 tained damage to the amount of \$4,000, by the default of * the said Thomas H. Bowie, as Register in Chancery, committed before the end of the third week in November, 1816, contrary to the condition of the bond, on which this suit is brought, that then the plaintiff is entitled to recover the above mentioned sum of \$4,000, notwithstanding the penalty of the said bond is only one thousand pounds. Which opinion the Court refused to give; but were of opinion, and directed the jury, that the plaintiff was not entitled to recover more than one thousand pounds, the penalty of the bond; (the opinion on this exception was given *pro forma*, by consent)—the plaintiff excepted.

3d Exception.—In addition to the evidence before stated in the preceding bills of exceptions taken by plaintiff, the plaintiff by its attorney offered the resolution of the General Assembly of Maryland, for 1822, No. 66: “Whereas it appears that many of the papers and

proceedings in the Chancery office, remain unrecorded during the time that Samuel H. Howard, Nicholas Brewer, James P. Heath and Thomas H. Bowie, acted as registers of said Court, and which papers they ought to have had recorded, inasmuch as they received payment for the same by the parties interested therein; therefore, *Resolved*, That the present Register in Chancery be, and he is hereby authorized and required, to proceed to examine all the unrecorded papers in his office, and ascertain as near as practicable, the probable cost of recording said papers, calculating the cost at the same rate he now receives per side, for recording papers of a similar nature, and report the result of his examination to the Governor and Council, and also to the next Legislature, stating distinctly the amount it will cost to record the papers and proceedings which each of the aforesaid registers ought to have had recorded, in compliance with the existing laws."

The plaintiff also offered in evidence the report made by the register in pursuance of this resolution. "Chancery office, 17th December, 1823: In obedience to a resolution of the General Assembly of Maryland, passed at the last * session of the Legislature, directing the Register of the Court of Chancery to report to **260** the next General Assembly, what will be the probable cost of recording all such papers as remain unrecorded, and which ought to have been recorded by each of the former registers respectively, the register begs leave to state, that in order to make such a report as appeared to him to have been contemplated by the Legislature by their resolution, he has found it necessary to examine individually, all the papers in his office remaining unrecorded. He has made this examination with great care and attention, and in the course of it has assorted the papers, and selected from the great mass of them, such as by the existing law are required to be recorded. These papers, which comprise about three-fourths of the whole, consist of all decrees passed since the year 1785, which direct a sale, conveyance or partition of lands, and real estate generally, for the recording deeds, and for the transfer of title under special Acts of Assembly. The following as the result of his examination, the register respectfully reports for the consideration of the Legislature. The probable cost of recording such of the above mentioned papers as ought to have been recorded by Samuel Harvey Howard, Esq. is estimated at \$4,500. The probable cost of such as ought to have been recorded by Nicholas Brewer, Esq. is estimated at \$3,000. The probable cost of recording such as ought to have been recorded by James P. Heath, Esq. is estimated at \$1,500. The probable cost of recording such as ought to have been recorded by Thomas H. Bowie, Esq. is estimated at \$1,500. All which is respectfully submitted.

RAMSAY WATERS, Reg. Cur. Can."

And also offered in evidence the resolutions of 1825, No. 29, 73, 117; and the resolution of 1823, No. 14, and the resolution directing the register to deliver the papers.

“No. 29. *Resolved*, That the Governor and Council be, and they are hereby authorized and required, to take under their superintendence the papers remaining unrecorded in the Chancery Office, and which should have been placed * on record by Samuel H. **261** Howard, Nicholas Brewer, James P. Heath, and Thomas H. Bowie, Esqs. late Registers in Chancery.

Resolved, That the Governor and Council be, and they are hereby authorized and required, to cause such of said papers as are required by law to be recorded, to be registered as soon as may be, in proper books to be procured for that purpose, and that such books of registry, after they are completed, be deposited and remain among the archives of said office.

No. 73. Whereas by resolutions of the present Assembly, the Governor and Council are authorized to procure certain valuable papers remaining in the Chancery office to be recorded: And whereas the Governor and Council entertain doubts of their authority under said resolutions to carry into effect the intention of the General Assembly in passing them; therefore,

Resolved, That the Governor and Council be, and they are hereby authorized and empowered, to contract in the name of the State, with some person or persons of integrity, understanding, and other proper qualifications, to discharge the labor and duties mentioned in said resolutions; and the Governor and Council are hereby authorized to draw quarterly and yearly as the work progresses, on the Treasurer of the Western Shore, which drafts the said treasurer is hereby directed to pay for such sums as may be necessary to meet the demands of the persons engaged in said work.

No. 117. *Resolved*, That the Register in Chancery be, and he is hereby authorized and required, before he deliver to the Governor and Council, or their order, any paper or papers in his custody, which by resolutions of the present General Assembly, the executive may be authorized to withdraw from his custody, to demand and receive a receipt, which shall sufficiently identify the said several papers and the cause or causes to which they relate; and the said receipt shall be sufficient in every case to discharge him from all responsibility on **262** account of the safety or preservation * of said papers, until the same shall have been returned to his charge and custody.

No. 14. *Resolved*, That if the said Registers in Chancery, Clerks of the Court of Appeals, Clerks of the several County Courts, Registers of Wills in the several counties of this State, and the Clerk of the City Court of Baltimore, who have failed to record such papers as by them respectively ought to have been recorded, shall not complete the records of the same on or before the first day of January, in the year eighteen hundred and twenty-five, then

that the Governor and Council be, and they are hereby authorized, to direct the Attorney-General, to institute such suit or suits as may be necessary for the recovery of such demands as may be due by each or all of said Registers in Chancery, Clerks of the Court of Appeals, Clerks of the several County Courts, Registers of Wills in the several counties of the State, and Clerk of the City Court of Baltimore."

Also the following proceedings of the executive: "Saturday, January 4th, 1826. The Council met. Present, His Excellency, Joseph Kent, Governor, and the Honorable Joseph Gabby, William Stewart, Robert H. Archer, Daniel Martin and John H. Steel, members of the Council. William D. Beall, George Brown, Isaac Hines, Henry Hobbs and Joseph Mayo, appointed to record the papers mentioned in the resolution of the present session, at twenty-five per cent. less than the law allows for the performance of such labors; the whole to be executed under the superintendence of the Register of the Court of Chancery, who shall be answerable to the executive for the faithful execution of his trust, and receive as full compensation therefor twenty per cent. on said allowance, to be paid by deductions at that rate from the work done by each person appointed as above. Stationary to be furnished by the Executive."

The following communication was received from Ramsay Waters, Esq. Register in Chancery, which was ordered to be entered upon the records of proceedings, viz:

"Chancery Office, 6th March, 1826. To the Honorable the Executive of Maryland: Gentlemen. A communication from your honorable body has been handed to me this morning, and I have given to it the most respectful consideration. I understand the communication to be an offer from the executive of compensation for certain services which they wish me to perform. The nature and extent of those services, and the heavy responsibility they impose, have been well considered. I think the proposed compensation wholly inadequate, and therefore cannot consent to accept. 263

Respectfully your obedient servant, RAMSAY WATERS."

Whereupon the following proposition was made, adopted and signed by the Governor and Council, viz: "Council Chamber, Annapolis, March 6, 1826. Ramsay Waters, Esq. Register in Chancery, having refused to accede to the proposition made him by the executive for superintending the recording of the Chancery papers mentioned in said proposition, the executive offered the same terms to Mr. Thomas Culbreth, Clerk of the Council, who accepted thereof, and is hereby ordered to take the papers mentioned in the resolutions of the General Assembly, to be recorded under his charge and superintendence, in such parcels as may be necessary for the due performance of the work, the same to be regularly listed and receipted for, and not to be taken out of the State house, and to be at all times subject to the examination of the Register in Chancery."

April 20th, 1826.—“Ordered, that Ramsay Waters, Register of the Court of Chancery, be authorized and required to deliver to each and any of the gentlemen appointed by the executive, namely, William D. Beall, George Brown, Isaac Hines, Henry Hobbs and Joseph Mayo, to record the unrecorded Chancery papers, under resolutions of the General Assembly, such portions of the said papers, dockets and other books relating thereto, as may be necessary to enable them to proceed with the said recording upon the order of Thomas Culbreth, under whose superintendence the papers have been placed by the executive.”

264 *No. 1. Extract from the proceedings of the Executive, May 7, 1825:

“Ordered, That the clerk write to the Attorney-General, and direct him to commence suits against all Registers in Chancery, Clerks of the Court of Appeals, Clerks of the several County Courts, Registers of Wills, and Clerks of the City Court of Baltimore, who have failed to record such papers as by them respectively ought to have been recorded, who have not completed the same agreeably to the resolution, No. 14, passed at December Session, 1823.” And also offered in evidence the following letter to the Attorney-General:

“In Council, Annapolis, May 7, 1825. Sir,—In compliance with a resolution of the General Assembly, passed at December Session, 1823, No. 14, you are hereby directed to institute such suit or suits as may be necessary for the recovery of such demands as may be due from each and all of the officers mentioned in the said resolution, who have failed to record such papers as by them respectively ought to have been recorded, and who have not completed the records of the same. I have the honor to be, with due respect, your obedient servant,

THOMAS CULBRETH, Clerk of the Council.

Thomas Kell, Esqr. Attorney-General.”

And the plaintiff also offered in evidence the original records made under the said resolutions and proceedings, and which have been by the said Thomas Culbreth returned to the Governor and Council and accepted by them, and now remain in the Council chamber for the purpose of binding up before they are deposited in the Chancery office; and offered in evidence that they had cost the State between twenty-seven and twenty-eight thousand dollars, which has been paid by the State; and that the proceedings in Chancery before the end of the third week in November, 1816, required by law to be recorded by the said Thomas H. Bowie, and left unrecorded by him, have been recorded under the said resolutions, and accepted by the Governor and Council, and deposited in the Council chamber as aforesaid; and * produced the said records here in Court, and

265 offered in evidence that these last mentioned records cost the State about \$725, which it has paid to the persons employed to make the said records in the manner above mentioned. The defendant offered in evidence from the said records so produced, that many of

the said cases improperly omitted to be recorded by the said Bowie, were suits between individuals to which the State was not a party, and in which the State had no other interest than what belongs to it as the guardian of the rights of its individual citizens. Whereupon the defendant by his counsel prayed the Court to instruct the jury that the plaintiff in this action is not entitled to recover from the defendant damages for the omission by Thomas H. Bowie to record proceedings and decrees in suits to which the State was not a party, and on account of which nothing was paid to the said Bowie by the State, or by him demanded of it. Which instruction the Court refused to give. The defendant excepted.

4th Exception.—In addition to the evidence stated in the preceding bills of exceptions, the defendant to support the issue on his part, proved by Ramsay Waters, Register of the Court of Chancery, that there were two record books in the Chancery office, in which were recorded proceedings required to be recorded by Mr. Bowie. That he had searched for them in the office repeatedly, but never at the request of the defendant or his counsel, and that they are not now in the office; that he missed them out of the office last summer; that he does not know by whom they were taken out; that he has never made any particular search for them out of the office, because he supposed that they were in the hands of some of the persons engaged in recording the Chancery records above mentioned, and supposed they were in the hands of Joseph Mayo. And also offered in evidence by the said Mayo, that he does not recollect taking out the said books, and does not know that he ever saw them out of the office; that he saw some dockets in the committee room of the House of Delegates, and these *two record books may for aught he knows have been among them; that he supposed that all of **266** these books had been returned to the Chancery office, but does not know that they were; that he went to-day to examine the book cases in the committee room of the House of Delegates, but he found that the book cases were locked up, and the key said to be in the possession of Gideon Pearce, the Clerk of the House of Delegates, who resides in this place, but who is now on the Eastern Shore, and witness could not therefore make the examination he wished. The plaintiff also offered in evidence by Charles Thompson, a clerk in the office of the Register in Chancery, and who has been engaged as clerk in that office for three years, that more than three years ago he saw one of the record books of the time of Thomas H. Bowie, in the library in the State House, where they were recording the Chancery proceedings under the resolution of the Legislature; that witness was not at that time a clerk in the office of the Register in Chancery, and does not know what has since become of the book, and has never enquired for it. The defendant then offered in evidence by Louis Gassaway, the principal clerk in the office of the Register in Chancery, that the defendant yesterday, while his trial

was going on, applied to him about the two record books made in Mr. Bowie's time; and the witness informed the defendant that they were not in the Chancery office, but he believed that either Joseph Mayo, who was the principal agent under Mr. Culbreth for superintending the recording of the Chancery papers under the resolution of the Legislature, or some of those engaged in recording the Chancery papers, had them. The defendant further offered in evidence that he then applied to said Mayo, who said that they might be among the books and dockets that were in the committee room of the House of Delegates, which had been used by the clerks when employed in recording the Chancery papers, and that he would examine there for them; that witness went to examine last evening,

267 but found the book cases locked, and * learned on inquiry that Gideon Pearce, the clerk of the House of Delegates, who has the key of the said book cases, is now on the Eastern Shore of this State, and witness was therefore unable to make the examination, and does not know whether the books are there or not. And after the aforesaid evidence was given, the defendant by his counsel, offered to read in evidence from one of the original minute books of the Court of Chancery the following reports and orders:

"In Chancery, September Term, 1818.—On examination of the dockets and files in the office of the Register of the Chancery Court, laid before me in pursuance of the order of the 2d instant, it is ordered, with respect to the decrees, papers and proceedings in the time of Thomas H. Bowie, the present register, remaining unrecorded, that six hundred sides of the said decree, papers and proceedings from December Term, 1815, ought to be recorded from the present time to the 31st instant, inclusive, an entry of which portion and period assigned the said register, is directed to make; and at the termination of the period above prescribed, to wit, on the first day of December Term next, being the first day of the month, the book is to be brought before me for my determination, whether the records are made up in the manner required by the Act of 1817, ch. 119.

W. KILTY, Chr. November 5th, 1818."

"In Chancery, December Term, 1818.—On the first day of December, 1818, that being the first day of this term, the register submitted to the Chancellor the following report, in obedience to the foregoing orders. To the Honorable WILLIAM KILTY, Esquire, Chancellor of Maryland. In obedience to the several orders of your honor, dated the 5th day of November, 1818, relative to the decrees, papers and proceedings in the Court of Chancery; 'That he now submits to your honor, for your inspection, two record books, which are marked, the one Liber T. H. B. No. 1, and the other marked Liber T. H. B. Sales, No. A—which books he has procured and in them recorded as

268 * he was directed, the number of sides of the decrees, papers and proceedings of the Court, during the time he has been

Register, and remaining unrecorded, pointed out by your honor in that order, which relates to himself."

THOMAS H. BOWIE, Reg. Cur. Can.

"In Chancery, December Term, 1818.—On considering the above and within report, and the books therein referred to, (relating to the decrees, papers and proceedings of Thomas H. Bowie, the present register,) being brought before me according to the order, passed November 5th, 1818, I do determine from what appears, that the records are made up to the time, appearing in said books, in the manner required by the Act of 1817, ch. 119, sec. 6. It is further ordered, with respect to the decrees, papers and proceedings of Thomas H. Bowie, the present register, that from this date to the first day of March Term next, there ought to be recorded 4,000 sides, commencing from the termination of what has been done under the former order.

WILLIAM KILTY, C. December 1st, 1818."

And the defendant then offered in evidence similar reports of the register, and orders of the Chancellor thereupon, in the years 1819 and 1820.

To the admissibility of which said reports and orders in evidence for the purpose of proving that the said Thomas H. Bowie, had recorded any of the proceedings before the third week in November, eighteen hundred and sixteen, which he as Register in Chancery was bound by law to record, and which by the records produced appear to have been recorded under the direction of the Governor and Council in the manner before stated, the plaintiff by his counsel objected—and the Court sustained the objection, and refused to permit the aforesaid entries in the said minute book, to be read in evidence for the purpose aforesaid. The defendant excepted.

5th Exception.—In addition to the evidence stated in the preceding bills of exceptions numbered 1, 2, 3 and 4, the defendant produced as a witness, Ramsay Waters, Esq. * the present register of the Court of Chancery, who succeeded T. H. Bowie, and **269** has been the register ever since, and by him proved that in the year eighteen hundred and ——— he was directed by the General Assembly to report to the succeeding Legislature, an estimate of the probable costs of making up the records of the several registers, and among the last, those of said T. H. Bowie; that he performed the duty with as much care and accuracy as he could, having till the next meeting of the General Assembly to complete it, and that according to the most accurate estimate he could make, the costs of making up the records of said office, whilst said T. H. Bowie was the register, to wit, from 1st January, 1816, to February, 1821, would be \$1,500. And the defendant then offered to prove by said Ramsay Waters, that according to that estimate it would have cost nothing to complete the records, for not completing which, this suit is brought, because the records for that period of time had been all correctly made up by the said Bowie, in his life-time—to the admis-

sibility of such last mentioned parol testimony so offered, the plaintiff by his counsel objected—and the Court was of opinion that the same was inadmissible and rejected the same. The defendant excepted.

6th Exception.—Upon the whole evidence stated in the preceding bills of exceptions, the plaintiff by his counsel prayed the opinion of the Court, that the books produced being records of the proceedings in the Court of Chancery, made out and recorded by the persons authorized and required by law to record the same, are of themselves *prima facie* evidence, that the papers and proceedings were such as the law required to be recorded by the said persons—and inasmuch as the defendant is liable for the default of the aforesaid T. H. Bowie, in not recording the proceedings in the Court of Chancery, which it became his duty between the date of his bond and the end of the third week in November, 1816, to record, that the plaintiff is
270 entitled in this action to recover the damages sustained by the State,* for such default of the said T. H. Bowie, and that the measure of damages is the sum paid by the State for recording the proceedings which it became the duty of the said Bowie, during the period last above mentioned to record, unless the defendant can shew by the inspection of the said books or other records of the Court of Chancery, that papers and proceedings have been illegally recorded in the books above mentioned, or that the State has paid an unreasonable sum for the said recording. To the giving of which instruction the defendant by his counsel objected, for admitting the right of the State to sue for the expenses incurred in the completion of said records—yet the whole of those expenses have been incurred since the institution of this suit. Because the papers which have been transcribed are not records, and have no right to be considered as such—and because said papers were selected by the persons who were merely appointed to transcribe the papers required by law to be recorded, and were not authorized to decide what papers ought to be recorded, and by the terms of the contract were to be paid according to the number of sides which they might record—and because the bond upon which this suit is brought, was not required by the Constitution, or any existing law, and therefore the defendant is not responsible under said bond, for the conduct of said Bowie, as Register of the Court of Chancery, for any period of time—and because the original papers have not been produced, and there is no proof that the copies have ever been examined or compared with the originals. But the Court gave the instruction as prayed by the plaintiff's counsel. The defendant excepted. Verdict and judgment for the plaintiff for \$652.12; both parties appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Taney (Attorney-General,) and *Boyle*, for the State, referred to the Acts of 1716, c. 1, s. 1, 3, 5; 1742, c. 10, s. 2, 3, 7; *Constitution*, Art. 10, s. 49; 2 *Maule & Sel.* 369; Acts of 1825, c. 208, s. 1; 1800, ch. 82, s. 2; 1801, c. 60; *Jackson vs. Hasbrouck*, 12 *Johns.* 194.

Magruder and *Brewer*, for Wayman, on Wayman's appeal, cited 12 *Johns.* 194; *Union Bank vs. Ridgely*, 1 *H. & G.* 324, 432; *Lord Arlington vs. Merrick*, 3 *Saund.* 414; *Lansdale vs. Church*, 2 *Durnf. & East*, 388; *White vs. Sealy*, 1 *Doug.* 49; *Wilde vs. Clarkson*, 6 *Term Rep.* 303; 1 *Atk.* 79; *Tew vs. Earle of Winterton*, 3 *Bro. Ch. Cas.* 489; *Brangwin vs. Perrott*, 2 *Wm. Black.* 1190; 2 *Mar. Rep.* 221; *Wood vs. Wade*, 2 *Stark. Rep.* 167; 1 *Marsh. Va. Rep.* 26; *Arnold vs. U. States*, 9 *Oranch*, 109; Act of 1742, ch. 10.

EARLE, J. delivered the opinion of the Court. On the trial of this cause in Anne Arundel County Court, both parties took exceptions, and have appealed to this Court. We will first decide on the exceptions taken by the State, and then turn our attention to those signed at the instance of the defendant.

The suit was instituted on an office copy of the bond of Thomas H. Bowie, late Register in Chancery, against Henry Wayman, one of his securities. The bond was entered into when Thomas H. Bowie was first appointed to the office, on the 24th day of January, 1816, and he continued to act as register until his death, in 1821, without being * re-appointed by the Executive, or having renewed his obligation to the State: and the first question that presents 278 itself is, can the plaintiff recover in this action, for the failure of Thomas H. Bowie to record all proceedings from the date of the bond, to the time of his death, which it was the duty of the Register of the Court of Chancery for the time being to record?

This general question brings into immediate view the constitutional point in the cause, as well as the construction to be given to the contract contained in the obligation which is the ground of the action. The one will be disposed of by a recurrence to the Constitution itself, and the other by an examination of the language of the condition of the bond, in connexion with the Act of Assembly under which it was given.

All appointments to office under the Constitution, by the Executive of the State, are made by the authority of the 40th, 48th, and 49th sections; and it not being pretended that the Register in Chancery is commissioned during good behavior, he is necessarily an officer of annual appointment, under the 49th section. The tenure of his office being limited, he cannot continue to act after his term expires, except in the single instance of the appointment of a successor, in which case he may act until such successor, commissioned in his stead, is qualified. If re-appointed, he may continue to act without any new commission or qualification, but unless re-appointed, he is not legally an incumbent of the office, and cannot lawfully perform

any of its duties. This is the plain interpretation of the Constitution; and in arriving at its meaning, our attention has been confined to the instrument itself, and we could not think ourselves at liberty to regard the devious course which is said heretofore to have been pursued in relation to the appointment of this officer. The constitutional grant limits the duration of the office to a certain term, and no irregularities in the proceedings of the appointing power, can extend it beyond that period. The idea so much insisted
279 * on, of continuing office without a re-appointment, until a new appointment is made, it is supposed has grown out of these deviations from the constitutional law, and therefore cannot receive the sanction of this Court.

The parties to the bond, executed it with an express reference to the provisions of the Constitution, as thus expounded; and if its language could create a responsibility, not comprehended within them, we do not think that the expressions of this contract operate such an effect. The condition rightly and properly pursues the form the Act of 1742 prescribes, and its words that seem to look to an extended responsibility, are, "whilst he shall continue in the office of Register of the Court of Chancery," "and during the time he hath officiated in the said Register's office;" and these, we are clearly of opinion, are to be construed to relate to the time the officer lawfully continues in his office, and not to a period when he holds it without authority. The provisions of the Constitution form the basis of the contract, and like the recital in the condition of a bond, restrain the indefinite expressions used in it, and adapt them to the intention of the parties. What this intention was at the time of making the contract, cannot be mistaken. It evidently was, to engage for a faithful discharge of duties, as long as they could be legitimately performed under the official grant, and no longer.

The question we have to decide in the second exception taken by the State is, whether plaintiff could recover in the action a sum larger than the penalty of the bond sued upon. This subject is not without its difficulties, and they have arisen chiefly from discordant adjudications in reference to it. We will not attempt to point out these discordances, but proceed at once with an expression of our own opinion, formed upon reflection, and on an attentive review of all the authorities we had an opportunity to examine.

When the penalty of a bond is sued for against a surety, the utmost that can be recovered is the penalty, and legal interest thereon, by way of damages, *pro detentione debiti*, * from the
280 time the debt is demanded. This is the import and effect of his contract, and his accountability cannot be stretched beyond it. In this position we are fully sustained by many authorities, but by none more effectually than by 1 *Saund.* 58, note 1, and *Harris vs. Clap et al.* 1 *Mass. Rep.* 308. This was an action against Clap and surety, on an arbitration bond, in the penal sum of \$5,000, conditioned to pay an

award of \$4,618.62, which had remained so long unpaid, that the interest carried the amount greatly beyond the penalty of the bond. Under a rule of reference in the Court of Common Pleas, a judgment had been entered up on the award against Clap; he removed the case to the Supreme Court, on a petition of review, which had been dismissed. In the suit on the arbitration bond, Clap and his surety confessed the forfeiture of the obligation; and the question made was, what sum the plaintiff was entitled to recover against the defendants. The Judges delivered their opinion at large, and determined that the judgments should be entered for the penalty of the bond, and interest thereon, by way of damages, for the detention of the debt from the time it was demanded by the writ; taking care that it should not exceed the sum due on the award, which was in truth and conscience the plaintiff's demand; and the Chief Judge declared, that in no case could the plaintiff's demand be allowed to overrun the penalty and interest thereon.

In the case under consideration, if the Court below had granted the plaintiff's prayer, sanction might have been given to a recovery opposed to this case of *Harris vs. Clapp et al.* and as we believe, to several other authorities on this doctrine, that could easily be adverted to. The plaintiff might have recovered \$4,000 or £1,500, notwithstanding the penalty and interest fell greatly short of that sum. The prayer, however, was refused, and we entirely approve of the opinion given by the Court, which declared, that the plaintiff was not entitled to recover more than £1,000, the penalty of the bond. It is not in every case that interest by way of damages is to be recovered on the penalty: and when the *case occurs, as it most commonly does where the obligee is plaintiff, or is asking in some form 281 for relief, it may be considered as an exception to the general rule, which limits the recovery by the penalty of the bond. 3 *Caine's Rep.* 49; 1 *Dougl.* 49; 2 *Wm. Black.* 1190; 6 *Term Rep.* 303, (no.;) *Equity Cases*, 92; 3 *Sergt. and Lowb.* 297. That the recovery in this action was properly so limited is apparent to us, when we call to mind that the question arose on a prayer to instruct the jury, who were to assess damages for breaches assigned or proved in the condition of a collateral bond, and were wholly unauthorized by the issues to find damages for the detention of the debt. Over the last they had no cognizance, and it cannot in any way be received in this case, as a subject for the instruction of the Court.

We have a word or two more for this branch of the case, before we dismiss it: We have to beg that our proposition may not be misunderstood. When we state, that the responsibility of a surety cannot be extended further than the penalty of the bond, with interest thereon, by way of damages; our meaning is, to apply it to a question of recovery in a single case, and in no manner to affect the rights of other persons, who may have just grounds to sue the same bond. If they have distinct demands, it is clear, that a recovery and pay-

ment in one suit can be no bar to other actions, in which the several claimants may recover to the same extent, and can only be limited by the penalty: and in particular cases, by the penalty and interest, as in *Harris vs. Clap et al.*

Having decided on the exceptions taken by the State, we will now turn our thoughts, for a short time, to the four remaining exceptions, signed at the instance of the defendant. In the third exception the defendant's prayer is laid at the root of the action, and denies the State's right to maintain it. The plaintiff exhibited before the jury, sundry resolutions of the Legislature, authorizing the Governor and

282 Council to contract, in the name of the State, * with some person or persons, to record the unrecorded papers in the Chancery office: and offered the proceedings of the executive under the resolutions. And also offered in evidence the original records, made under the said resolutions and proceedings, and which had been returned to the Governor and Council, and accepted by them, and remained in the Council chamber for the purpose of binding up, before they were deposited in the Chancery office. He also offered in evidence that the proceedings in Chancery, before the end of the third week in November, 1816, required to be recorded by Thomas H. Bowie, and left unrecorded by him, had been recorded under the said resolutions and proceedings, and accepted by the Governor and Council, and deposited in the Council chamber as aforesaid; and he produced the said records in Court, and offered further in evidence, that these last mentioned records cost the State about \$725, which it had paid to the persons employed to make the same. The defendant on his part offered in evidence from the said records so produced, that many of the cases improperly omitted to be recorded by Thomas H. Bowie, were suits between individuals to which the State was not a party, and in which the State had no other interest than what belongs to it as the guardian of the rights of its individual citizens. And then prayed an instruction to the jury, that the plaintiff was not entitled to recover damages for the omission by Thomas H. Bowie, to record proceedings and decrees in suits, to which the State was not a party, and on account of which nothing was paid to Bowie by the State, or by him demanded of it. Our reflections on this point, have satisfied us, that the Court were right in refusing this direction to the jury. To say nothing at present of the Acts of 1716, ch. 1, and 1742, ch. 10, which in terms give the action to the public, it appears to us, it may be sustained by the State on one ground without the aid of others. The records of our Courts of justice are to be considered as public property, and so important is it to the community that they should be made up correctly and *
283 preserved with care, that when a neglect in these particulars in any of its officers occurs, an obligation is imposed on the State to supply the defect, and have the work done at the expense of the treasury. The defaults of the officers are thus visited on the public,

and their bonds afford the only means of security for the State to resort to against loss.

The fourth and fifth exceptions present questions of evidence, and are of minor consideration, and will be disposed of at the same time. The defendant wished to give in evidence two record books, in which were recorded proceedings required to be recorded by Thomas H. Bowie. He proved by the present register, that two such books were in the Chancery office, and being unable to produce them, he endeavored, by testimony, to show they were lost, in order to let in the secondary proof of them, which he offered to lay before the jury. The point then is, whether his testimony was sufficient to answer the purpose he had in view. Whether the evidence of the loss of the books, was such as to authorize the admission of the proof offered. The Court below thought it was not, and we cannot but coincide in the opinion. The utmost extent to which the testimony went, was to prove that the books inquired after had been missed from the Chancery office, and that there was every reason to believe they had been taken out by, and were in the hands of, some of the persons engaged in recording the Chancery proceedings, under the resolutions of the Legislature: and that Joseph Mayo, the only one of the recording clerks applied to for these record books, stated he did not recollect having taken them out, and did not know that he had ever seen them out of the office; and while the trial was going on, that he made an unsuccessful search for them among the books and dockets in the committee room in the House of Delegates, which had been used by the clerks when employed in recording the Chancery papers. This testimony is inconclusive and unsatisfactory, and leaves the mind in doubt, whether by a further * search the record books sought for, might not have been regained. Seven- 284
ral persons were employed in making up these records, and for some purpose, it is believed, had these books, and yet one of them alone was applied to for them, and the application to him was made at so late a period, that a confused and hurried examination for them could only be made. This is not the reasonable diligence the law requires in hunting up lost records, and is insufficient to let in, to the jury, the parol proof mentioned in the fifth exception, or the inferior evidence offered by the defendant in the fourth exception. The primary character claimed on the argument, for the reports and orders in the time of Chancellor KILTY, made under the Act of 1817, ch. 119, and offered in the fourth exception, cannot be acceded to them. If they are evidence at all, a point upon which it is unnecessary to make up an opinion, they must range in the subordinate class, and cannot be received to supply the place of a record, until conviction is produced on the minds of the Court of the loss of it. The principal objection made by the defendant in the last exception, to the instruction prayed by the plaintiff was, that the bond sued on was not required by the Constitution or any then existing law, and therefore he was

not legally responsible under the said bond, for the conduct of Bowie, as Register of the Court of Chancery, for any period of time. This is a question of some magnitude, and we must return again to the Constitution for the solution of it. The sheriff is the only officer who is required, in express terms, by the Constitution to give bond and security, and this, by the 42d section, he is bound to do, every year, "as usual." The form then in use was prescribed by the Act of 1715, ch. 46, and it was constantly after used by the sheriff elected by the people, until the year 1794, when it was found expedient to increase the penalty and alter some parts of the condition. It was competent to the Legislature to prescribe a new form of bond for the sheriff, immediately after 1776; but at that juncture, there was other business to occupy that body, and they

285 * were willing to repose upon the then laws of Maryland, which unquestionably formed the ground work of the Constitution itself. How else are we to understand the before mentioned expression of the 42d section, as usual, which has a direct reference to the existing laws, or the practice under them. The county clerks, by the Constitution, are to hold their commissions during good behavior, and although they are not expressly directed to give bond and surety, as in the case of the sheriff, from the year 1776 to the year 1800, bonds were given by them, and that, according to the form prescribed by the Act of 1742, chap. 2. In the last mentioned year, the year 1800, a law was passed compelling the Clerks of the County Courts to give bonds in larger penalties, and with a different form of condition. The same may be said of the other officers named in the Act of 1742, and in the Constitution of the State; all of whom, at one period or other, within the last fifty years, have complied with the Act, and given bond, pursuant to its provisions, without any respect whatever to the tenure of their offices, which, under the Provincial government, it is believed, was only *durante bene placito*. *Bordley vs. Lloyd*, 1 H. & McH. 27. All this uniformity of proceeding, from the earliest times, goes forcibly to prove, that the Acts of 1716, ch. 1, and 1742, ch. 2, were existing laws at the adoption of the Constitution, and were so considered by those who were first engaged in carrying it into execution. If this wants further confirmation, we think it may be found in the 10th section of the Constitution itself, which seems to point to those laws, and to imply strongly, that other officers than the sheriff were to give bond with security. The section gives to the House of Delegates power to direct all office bonds, which are to be made payable to the State, to be sued for any breach of duty. We clearly think, then, that the defendant was responsible under the bond, for the conduct of Bowie, as Register of the Court of Chancery, the first year he was in office. Other objections were

286 * started by the defendant to the plaintiff's prayer in the last exception, all of which we consider groundless, and as forming no legal impediment to the instruction given by the Court to the

jury. We do not deem it necessary to give them a particular notice.

Judgment affirmed.

MORRIS vs. CHAPMAN'S Administrator.—June, 1830.

Upon a bill being filed to recover the value of certain negroes, which M. held in trust for the complainant, and which had been sold through the intervention of an agent who considered himself entitled to the proceeds, it was agreed between M. and the agent, that if M. would delay settlement and permit the agent to retain the money, and defend the bill, he would indemnify him from all loss. A final decree having passed against M. in an action brought upon his contract of indemnity, *Held*, it was competent for the defendant to give in evidence, that he had apprised the plaintiff in due time of the nature of the defence, which he desired should be made to the suit, and of the sources by which he meant to establish it, so as to enable the plaintiff, by resorting to such evidence, to ascertain if he could be justified in putting in such an answer as was desired; and also to show that the plaintiff had failed to comply with his contract, by refusing to permit him to defend the bill.

If the defendant supplied the plaintiff with a proper answer, supported by such proofs as would furnish the latter with a reasonable ground to believe the facts stated in the answer to be true, he was bound by the spirit of his contract to have accepted and filed it, or put in answer containing in substance the same defence.

Whether such answer was furnished, and such proofs given as would lay a reasonable ground for the plaintiff's believing the defence set up by the defendant, was a question of fact for the jury, to be determined by an exhibition of the answer and proofs in support of it, as communicated to the plaintiff.

If the plaintiff in his conscience could not put in the answer furnished him by the defendant, good faith on his part demanded that he should have pointed out his objections and difficulties to the defendant.

APPEAL from Charles County Court. Assumpsit by the appellant, William Morris, against the appellee, John G. Chapman, as administrator of Samuel * Chapman, brought on the 7th of March, 1825. The first count in the declaration stated, that the said **287** Samuel, in his life-time, to wit, on the 18th September, 1818, acting for, and in behalf of the said William, who then and there had and held certain negro slaves, in trust for the use and benefit of a certain Sarah Maddox; he the said Samuel, at the request of the said William, sold and delivered to divers persons, the said negro slaves, and received therefor, the sum of \$1,457, to wit, on, &c. at, &c. which said sum of money the said William hath since paid, and satisfied to the said Sarah Maddox by, and under a decree of Charles County Court in Chancery sitting, of which said matters and things, the said Samuel in his life-time had notice, &c. There were also counts for money had and received, for money paid, laid out, and expended,

and for matters, and articles properly chargeable in account. The defendant pleaded *non assumpsit*, to which issue was joined.

1. At the trial the plaintiff gave in evidence to the jury, the written authority from the plaintiff to the defendant's intestate to sell certain negroes, which negroes the plaintiff held in trust for Sarah Maddox, (formerly Sarah Ware,) the complainant in a bill in Chancery hereinafter referred to, and also a written authority from said intestate to a certain Robert Finch, to sell part of the negroes, and his the intestate's receipt, for the amount of said sales \$1,100, to wit, "Charles County, February 17th, 1818. I do hereby authorize Samuel Chapman, to sell and dispose of certain negroes (described by name) with their increase, as witness my hand and seal, the day and date above written. William Morris, (seal.)" "I do hereby authorize Robert Finch to sell Louisa, Francis and Washington (being the children of one of the female slaves mentioned in the authority from Morris to him) as witness my hand and seal this 17th day of April, 1818. Samuel Chapman, (seal.)" He then proved by a competent witness that the balance of said negroes was sold for \$450, and that the net proceeds (deducting expenses,) amounting to \$1,457, were received by said Chapman. He * also read in evidence to the
288 jury, the bill and exhibits filed by Sarah Maddox, against him the plaintiff, his answer, and supplemental answer thereto, the bill of interpleader filed by the defendant's intestate, and the decree of the Court, on the bill of the said Sarah Maddox, passed on the 9th of June, 1824, by which he was ordered and directed to pay her the sum of \$654.20, with interest from the 31st January, 1818. He further proved, that after the passing of said decree, and a *fi. fa.* thereupon issued, had been levied on his property, he gave notice to the said intestate, that he was about to pay the money over to Mrs. Maddox, and if he wished to take any measures to arrest the same, now was the time. He then proved the payment of the money so decreed against him, in favor of Sarah Maddox. He further proved that some time after the filing of said bill of complaint by Sarah Maddox, and a little time before his, the plaintiff's answer thereto, was filed, (but the witness could not state the precise time,) the plaintiff, and the defendant's intestate went to the house of the witness, and said Chapman told the witness they had come to him to witness their contract. He, Chapman, then stated that Mrs. Maddox had filed a bill against Morris to recover the money, for which certain negroes had sold, and that Morris wished to settle the matter with Mrs. Maddox, and had called on him for the proceeds of the sale of said negroes to enable him to do so. Chapman also stated that he had agreed with Morris, that if he Morris would delay settling with Mrs. Maddox, and let the case go to final hearing, and permit him to retain the money, and defend the suit, that he, Chapman, would indemnify him, Morris, against all loss, that is, would repay to him everything that should be recovered in that suit,

together with all his expenses incurred in defending the same, both private and legal. The witness had been employed by Morris, as his solicitor in the case of Sarah Maddox against him. The witness then asked said Chapman what he wished done for him in that case, when Chapman replied that he did not employ * witness as his solicitor, but should employ his own counsel to manage **289** the cause. In answer to a question from the defendant's counsel, the witness stated, that he deduced from everything that Chapman said, that he claimed an interest in the money for the recovery of which the bill was filed by Sarah Maddox. The plaintiff further proved, that the *subpœna* was returnable to August Term, 1824, which was issued to compel the plaintiff to answer the bill of interpleader, filed by said Chapman, and that an attachment subsequently issued against him for the same purpose. The defendant then read in evidence to the jury, copies of the two following letters written by his intestate to the plaintiff, having previously proved the service of a notice on the plaintiff to produce the originals.

"Dear sir, I was not until last night informed of the contents of Mrs. Maddox bill, or your answer; at both I am equally surprised: first, that she should have sworn that she received no consideration for the negroes sold, and that you should have sanctioned it by admitting in your answer, that there would be a considerable amount due her, which you are ready and willing to pay her; when she and you both know, that when it was first determined that the negroes should be sold, it was with an express understanding that I was to purchase with the money arising from the sale, goods, &c. for the family to a considerable amount, and you both know I have done so; all which I can prove by indifferent, and incontestable testimony. Sir, this business comes in a questionable shape, and has at best a suspicious aspect, and if the business is not immediately settled, between Mrs. Maddox and yourself, character must be implicated, and the whole affair probed to the bottom, as I am determined mine shall not suffer. SAMUEL CHAPMAN. May 4th, 1823."

"Dear sir, I again solicit your attention to this business of Mrs. Maddox's—you will perhaps say it is none of my business; such may be, and I believe it is the fact, but to prevent any misunderstanding between you and myself, in * the settlement of our accounts, (which I wish to take place immediately,) I have thought it **290** well to inform you, that on seeing your property advertised, I intended to get a writ of injunction to stay the proceedings, and leave the money in your hands for my use; but on consulting counsel, was advised to have no more to do in the business; that having put in a bill of interpleader which had not been answered, either by Mrs. Maddox or yourself; that until that was done, under all the circumstances nothing can or ought to be claimed of me, either in law or equity. I was also informed, on enquiry as to the amount of the judgment, it was for about \$90 or \$95 more than it ought to have

been, upon which ground you may obtain an injunction, and you can then by putting in your bill praying a reviewal, have the matter fully and fairly investigated, by which investigation you can prove that every cent of the money has been paid over, and that Mrs. Maddox has frequently and often said, that I did not owe one cent, but that she had received the whole. I have thought proper to give you again this information, least you might expect to get something out of me, and under this idea might be disappointed. You now have it completely in your power to defeat Mrs. Maddox's claim against you, and if you do not do so, recollect that it is not my fault. June 29th, 1824."

To the reading of these copies the plaintiff objected.

The defendant then offered to read in evidence, the draft of an answer which this intestate had prepared and sent to the plaintiff, for him to swear to and file, as his answer to the before mentioned bill by Sarah Maddox, and proved that the purport of the same was communicated to the plaintiff, by the person by whom it was sent. That said plaintiff refused to receive the said paper, and the witness who carried it back to said intestate told him he was not certain what answer the said plaintiff made when he offered him the said paper. Accompanying the said paper, there were two affidavits, one of which was sworn to on the 4th of June, 1823, going to establish the facts contained therein. * The plaintiff objected to the **291** reading of these papers, but the Court allowed them to be read, and the plaintiff excepted.

The defendant then prayed the Court to instruct the jury, that if they should be of opinion from the evidence in the cause, that the defendant's intestate had by his contract assumed upon himself the defence of the case in Chancery by Sarah Maddox against William Morris, (the plaintiff,) so far as his Chapman's interest was involved therein, then that the defendant's intestate was absolved from his contract with Morris to repay to him whatever said Sarah Maddox might recover from him in said Chancery suit, and expenses, if said Morris refused to put in said answer, unless they should also find, that he pointed out his objections to said answer, at the time it was offered to him to be filed; which opinion and instruction the Court gave. The plaintiff excepted, and the verdict and judgment being for less than he claimed, he prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., MARTIN and ARCHER, JJ.

Stonestreët, for the appellant. 1. The Court below erred in permitting to be read to the jury the copies of the two letters from Chapman, the intestate of the appellee, to the appellant. 1 *Phil. Er.* 389. 2. That the answer, prepared and tendered by the appellant's intestate to Morris the appellee, and the accompanying affidavits, were inadmissible as evidence.

C. Dorsey, for the appellee, cited *Stark. Ev.* 17; *Douglass*, 635; 1 *Term Rep.* 638; 7 *Id.* 125; *Chitty on Plea.* 279, 339.

ARCHER, J. delivered the opinion of the Court. It appears from the evidence in this cause, that Sarah Ware being about to intermarry with John Maddox, conveyed by bill of sale, dated the 28th December, 1807, sundry * negroes to the plaintiff, in secret trust for her use. That afterwards it was agreed that the plaintiff should sell the negroes, and that the proceeds should be held by the plaintiff for her benefit. On the 17th February, 1818, the plaintiff authorized the defendant to sell the negroes. That they were accordingly sold for the net sum of \$1,457. Sarah Ware, after her intermarriage with John Maddox, and after his death, instituted a suit in the County Court as a Court of Chancery, (at what time does not appear,) against the plaintiff, alleging the trust and sale by the plaintiff, and praying that he might be compelled to account. Shortly afterwards, and before any answer had been put in by the plaintiff, the defendant, who had received the proceeds of the sale of the negroes, as agent of the plaintiff, entered into a contract with the plaintiff, by which he stipulated, that if the plaintiff would delay to settle with Mrs. Maddox, and let the case go on to final decree, and permit him to retain the money and defend the suit, that he would indemnify the plaintiff against all loss, that is, would repay to him everything which should be recovered in that suit, together with all his expenses in defending the same, both private and legal. This agreement on the part of Chapman, appears to have been made, on account of an interest he supposed he had, in the moneys claimed by Mrs. Maddox against the plaintiff. At the time of this agreement, the solicitor of the plaintiff desired to know of the defendant what he wished to have done for him, in that case, who declined to furnish the information, but stated that he would employ his own solicitor. Shortly after this agreement, about the month of August, 1821, (as may be collected from the affidavit attached to the answer) the plaintiff filed his answer to the bill of Mrs. Maddox, whereby he claimed sundry payments and disbursements from the funds, arising from the sale of the negroes, which had been made at the solicitation of the claimant, amounting to the sum of \$892.80, and professed a willingness to pay to the complainant the balance of the proceeds of sale. Between the months of * May and August, 1823, the defendant transmitted to the plaintiff the draft of an answer to the bill of Mrs. Maddox, containing a reiteration of the answer which the plaintiff had already put in, and in addition thereto, a statement, that he had advanced very considerable sums of money, at the request, and with the concurrence of the complainant, to an amount beyond the proceeds of sale; and accompanied the said answer, with the affidavits of two witnesses, verifying some of the facts stated in the answer thus furnished, as connected with advances

by the defendant. This answer the plaintiff not only refused to accept, but to examine. In the month of November, 1823, Morris, the plaintiff, filed a supplemental answer to the bill of Mrs. Maddox, in which he set out in part only the defence of the defendant, as set out in his answer which he had furnished. And the Chancery suit was set down for hearing at June Term, 1824, when a decree passed against Morris, for the sum of \$654.20. It was further proved, that the plaintiff gave the defendant notice of the decree against him, and that he was about to pay the same, and that if he wished to take any measure to arrest the payment, that was the proper time. The defendant in addition, offered in evidence copies of two letters, the one dated the 4th of May, 1823, and the other dated the 29th of June, 1824, twenty days after the decree, first having offered evidence of a notice to produce them. The admission of these letters in evidence, constitutes the first objection to the opinion of the County Court. It would have undoubtedly have been competent for Chapman, to have given evidence that he had apprised the plaintiff of the nature and character of the defence, which he desired should be made to the suit, and to have informed him of the sources by which he meant to establish such defences, so as to enable the plaintiff by resorting to such evidence, to ascertain if he could be justified in putting in such an answer as was desired. A letter giving such information would have been admissible. But the letter of the 4th of May, 1823, is not of this character. It is a letter only appealing * to the plaintiff's knowledge, that he had expended at the request of Mrs. Maddox a considerable sum, and abusing him for the answer he had filed. It is true, he says, that he can establish the facts, which he alleges are within the plaintiff's knowledge, but he does not point to the persons who would prove them. This letter was therefore not calculated to enable the plaintiff to comply on his part with the agreement. It gave him no further information, as it admits, than what he had. The second letter we think is still more objectionable. It was written after the decree, when the contract between the parties was either fulfilled or violated. After such a period nothing which either party might say in relation to the matter, could be evidence for himself. The Court below permitted the defendant to read in evidence the answer furnished by the defendant to the plaintiff, to be filed as the plaintiff's answer to the bill; and also permitted, as appears by the last bill of exceptions in the record, two depositions to be read to the jury which had accompanied the answer—in this we think the Court were right. It was competent for the defendant to show that the plaintiff had failed to comply with his contract, in refusing to permit him to defend the suit, and if he had supplied him with a proper answer, supported by such proofs, as would furnish the plaintiff with a reasonable ground to believe the facts stated in the answer to be true, he was bound by the spirit of his contract to have accepted and filed it, or to have put

in an answer, containing in substance the same defence. And whether such answer was furnished and such proofs given, as would lay such a reasonable ground, was a question of fact for the jury, and could only be proved by exhibiting to the jury the answer itself and the proofs offered. They were not offered with any other view, nor could they be. They were no evidence to the jury of the truth of any fact therein stated, but only evidence to shew that Chapman had offered to defend, and his defence was such, as ought to have been accepted, or filed in the cause by the plaintiff. The direction of the * Court in relation to the contract, turns altogether on the plaintiff's obligation to point out objections to the answer furnished, if he did not think proper to accept it. We however have taken a different view of the duties of the parties under this contract. Chapman was to be allowed to defend the suit, but it could only be done through the intervention of the plaintiff. If Chapman had furnished an answer, supported by such proofs as would give the plaintiff reasonable grounds for believing the truth of the facts he stated, the plaintiff was bound to have accepted it, or to have filed an answer containing in substance the defence it set up, and could not discharge himself from such obligation by stating objections to it. The compliance of Chapman with his contract was solely to be determined, by the character of the defence made and offered. If that was of the description above mentioned, and it had been rejected, the defendant would have been absolved from his contract, unless the plaintiff had himself filed an answer, containing the substantial defences set up in the rejected answer. Although the answer furnished had not been accepted, still Chapman would have been bound if the plaintiff had put in an answer containing in substance the defence of the defendant. If this proposition be true, and we think it cannot be denied, it conclusively shows that the opinion of the Court below in this respect was erroneous, for then he might have rejected the answer, have assigned no reasons, yet by putting in an answer in his own way, but containing the substance of the rejected answer, might still have held the defendant to his contract. The directions of the Court appears to be bottomed on the hypothesis, that the answer was such, as the plaintiff could not put in; and if the prayer had been so framed, we should not have objected to the directions given, in the form in which they were, to the jury. For if the defendant, endeavoring to comply with his contract, had furnished an answer which the plaintiff in his conscience could not put in, good faith on his part would seem to have demanded, that he should have * pointed out his objections and difficulties to the defendant, that he might have been enabled so to shape his defence, that the plaintiff could conscientiously have made it. It has been stated that it would have been competent for the plaintiff after having rejected the answer, to have held the defendant to his responsibilities under the contract, provided he had filed an answer himself, cover-

ing in substance, the defence which the defendant desired should be made, and it has been urged in the argument that this has been done. But a reference to the supplemental answer will show, that it did not cover the defence which the defendant had set up.

Judgment reversed, and procedendo awarded.

KEPLINGER vs. GRIFFITH.—June, 1830.

Where the agent of an endorsee, the holder of a promissory note, called upon the maker for the payment of the note, and the maker offered to pay the same in goods, which the agent declined receiving, having authority only to accept money, it is unnecessary in an action upon the note to prove either the hand-writing of the maker or previous endorser; as the offer to pay the agent, amounted to an admission that everything had been done necessary to the endorser's right to receive the money; that there was no objection to his paying the note, and superseded the necessity of further proof. (a)

In an action by the endorsee against the maker of a promissory note, negotiated before maturity, evidence that a few days before the institution of the suit, the witness spoke to the defendant on the subject of the note, when the defendant said he could not pay it, that the payee of the note had charged him too much, that some discount must be taken from the note, and that he must see the payee on the subject; that, however, he would think of it, and if witness would call at his store in a few days, he would say more about it; that shortly after witness did call, when defendant said he was going to P. when he would see the payee, until then he could do nothing further, is a sufficient answer to the plea of limitations. (b)

APPEAL from Baltimore County Court. Assumpsit, by the holder, the second endorsee, against the maker of a promissory note, dated March the 10th, * 1819, payable four months after date, for **297** \$188.87. The writ issued on the 31st of July, 1824. The declaration contained a count on the note, and for money had and received. The defendant pleaded—1st. *non assumpsit*. 2d. *non assumpsit infra tres annos*—and 3d. *actio non*, &c. to which issues were taken.

At the trial the plaintiff offered in evidence the following promissory note, with the several endorsements thereon. “\$188.87½. Baltimore, March 10th, 1819. Four months after date, I promise to pay to John Kiems, or order, the sum of one hundred and eighty-eight dollars and eighty-seven cents, for value received.

“SAMUEL KEPLINGER.”

(a) Cf. *Beck vs. Thompson*, 4 H. & J. 428, note.

(b) Approved in *Brookes vs. Chesley*, 4 Gill, 208; *Carter vs. Cross*, 7 Gill, 48; *Ellicott vs. Nichols*, 7 Gill, 99; *Mitchell vs. Sellman*, 5 Md. 388; *Buffington, vs. Davis*, 33 Md. 514. See *Oliver vs. Gray*, 1 H. & G. 144, note.

(Endorsed.) "Pay the contents to C. E. Chevalier, or order, John Kiems." "Pay the contents to Caleb Griffith, or order, C. E. Chevalier."

And further offered evidence that said note was forwarded to witness by the plaintiff, before it was at maturity, by whom it was placed in bank for collection. Said note, however, not being paid, witness afterwards called several times on defendant for payment, and was offered payment in goods, particularly steel watch chains, but witness having no authority to accept anything in payment but money, declined taking them; the aforesaid transactions took place before the year 1821. Subsequently to this period, that is to say, a few days preceding the institution of this suit, the witness met the defendant in one of the streets of the City of Baltimore, and addressed him on the subject of the aforesaid note, when the defendant said he could not pay the said note; that Mr. Chevalier had charged him too much, and that some discount must be taken from the note, and that he must see Mr. Chevalier on the subject. Defendant, however, said he would think of it, and if witness would call at defendant's store in a few days, he would say more about it; that shortly afterwards witness did call, when defendant said he was going to Philadelphia in a few days, when he would see Mr. Chevalier; until then he could do nothing further. Upon the foregoing pleadings * and testimony, the defendant moved the Court for their opinion and direction to the jury, that the plaintiff was **298** not entitled to recover—Because, First. The making of the note in question by the defendant, and the several endorsements thereon have not been duly proved on the part of the plaintiff, nor any evidence thereof given. Second. A new promise within three years before the commencement of this suit to pay the said note by the defendant, so as to remove the bar of limitations insisted on in his second and third pleas, has not been proved, nor any evidence thereof given. Third. No evidence has been given on the part of the plaintiff, that he did take, or offered to take any discount from the said note, or otherwise perform the condition on which the supposed new promise was made. Which opinion and direction the Court [HANSON, A. J.] refused to give, but were of opinion and so directed the jury, that if the jury believed the witness, the plaintiff was entitled to recover. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Williams (District Atty. U. S.) for the appellant, cited *1 **299** *Camb. Rep.* 100; *Peak. Evid.* 220; *Sidford vs. Chambers*, 2 *Serg. & Low.* 410; *Smith vs. Chester*, 1 *Term Rep.* 654; *Oliver vs. Gray*, 1 *H. & G.* 214, 216, 218, 219; *Wetsell vs. Bussard*, 11 *Wheat.* 309, 310; *Bell vs. Morrison*, 1 *Peters*, 351; *Roosevelt vs. Mark*, 6

Johns. Ch. 290; *Sands vs. Gelson*, 15 *Johns.* 511; *Sluby vs. Champlin*, 4 *Johns.* 469, (note B.); *Harrison's Index*, 67; *A'Court vs. Cross*, 3 *Bingham*, 329; 2 *Barn. & Ald.* 759; 4 *Maul. & Selw.* 157; *Short vs. McCarthy*, 3 *Barn. & Ald.* 626; *Hellings vs. Shaw*, 7 *Taunt.* 608; 2 *Harr. Index*, 925; 4 *Bingham*, 105; *Ib.* 303; 6 *Barn. and Cres.* 603.

Johnson, for the appellee. 1. The conversation which first took place between the witness and the defendant was certainly evidence for the jury, and if true, entitled the plaintiff to a verdict. A promise to pay a note after it is due, amounts to proof of everything, which otherwise the party would be bound to prove. *Jones vs. Morgan*, 2 *Camp. Rep.* 474; *Sidford vs. Chambers*, 2 *Serg. & Low.* 410; *Chitty on Bills*, 410, (Ed. 1819;); *Lundie vs. Robertson*, 7 *East*, 231; 1 *Wheat. Selw.* 279; *Saund. Plea. & Ev.* 337. On the question of limitations, he referred to *Oliver vs. Gray*, 1 *H. & G.* 204.

BUCHANAN, C. J., delivered the opinion of the Court. This suit was brought on a promissory note, given by the appellant to John Kiems, who endorsed it to C. E. Chevalier, by whom it was endorsed to the appellee, in a regular course of negotiation, before it was at maturity. The pleas of *non assumpsit*, *non assumpsit infra tres annos*, and *actio non*, &c. were put in, on which issues were taken. The Judge here, after referring to the evidence contained in the bill of exceptions, stated, that upon the pleadings and * testimony, **300** the appellant moved the opinion and direction of the Court to the jury, that the appellee was not entitled to recover, on three grounds. First, that the making of the note by him, and the several endorsements thereon, had not been proved, nor any evidence thereof given. Second, that a new promise by the appellant, within three years before the commencement of the suit to pay the note, so as to remove the bar of limitations insisted on in his second and third pleas, had not been proved, nor any evidence thereof given. Third, that no evidence had been given on the part of the appellee, that he took, or offered to take any discount from the note, or otherwise perform the condition on which the supposed new promise was made. Neither of these objections to the right of the appellee to recover was sustained; but the Court before which the cause was tried, was of opinion, and so instructed the jury, that the appellee was entitled to recover, if they believed the witness; in which we concur with that Court. As to the first point, the suit was against the appellant as the maker of the note, the execution of which was a matter within his own knowledge; and surely his offer to pay it, when called upon after it became due, was sufficient evidence of his signature, a sufficient admission that he was the maker of it. The several endorsements by which it came to the hands of the appellee, being set out in the declaration, it became necessary at the trial to prove them; and as it is not to be supposed that the appellant would have paid it

to any one whom he did not know to be entitled to receive it, his offer to pay it to the agent of the appellee, was a sufficient admission of the endorsements, and of the appellee's right to receive it. It amounted to an admission that everything had been done necessary to the appellee's right to receive it, and that there was no objection to his paying the note, and superseded the necessity for further proof. *Sidford and another vs. Chambers*, 2 Serg. & Lowb. 410. In *Jones vs. Morgan*, 2 Camb. Rep. 474, which was an action against the drawer of a bill of exchange, dishonored * for non-payment after being accepted, it was decided that though it was unnecessary to have stated the acceptance in the declaration, yet as it was stated it must be proved; but that a promise to pay after the bill became due, was a sufficient admission, as well of the acceptance as of the hand-writing of the defendant. The same principle will be found in *Lundie vs. Robertson*, 7 East, 231. **301**

As to the second point, in *Oliver vs. Gray*, 1 H. & G. 204, it was ruled by this Court, that an acknowledgment of the debt, with a naked refusal to pay, or a refusal accompanied with an excuse for not paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient to take a case out of the Statute of Limitations. Now this is just that case. The offer to pay the note was not proved to have been made within three years before the bringing the suit; but the making of it by the appellant, and the several endorsements upon it, being established, his saying when spoken to on the subject, only a few days before the suit was instituted, "that he could not pay it, that Chevalier had charged him too much, and some discount must be taken from it; and that he must see Mr. Chevalier on the subject," was a clearly implied admission that the debt remained due and unpaid, and the excuse alleged for not paying it, furnished no real objection to the payment of it, if true. The note came to the hands of the appellee by endorsement in a regular course of negotiation, and if the suit had been brought within three years, it would have been no defence to the action, that Chevalier had charged the appellant too much, for it would seem to have been given on account of some transaction with Chevalier; and the admitted continuing existence of the debt, carried with it the assumption raised by the law. And as to the third point, that the appellee had offered no evidence that he took, or offered to take any discount from the note, it is answered by saying, that he was under no obligation to make any discount. The appellant was entitled to no * discount as against him; nor against any body else, as far as appears, for there is no evidence in the record on the subject. And even if he could have been entitled to a deduction from the amount of the note, in a suit between him and Chevalier, there is no pretence for saying that the note was subject to the same deduction in the hands of the appellee. **302**

Judgment affirmed.

DAVIS vs. LEAB.—June, 1830.

This Court, since the Act of 1825, ch. 117, so far as regards the common law cases, is strictly an Appellate Court, deciding every cause upon the question submitted below, and upon none other.

So where after the evidence had been all offered in the County Court, the defendant prayed the Court to instruct the jury, that the plaintiff was not entitled to recover, and the Court gave the instruction, but the record did not show the point upon which that Court acted, this Court can neither reverse nor affirm—in such case the appeal must be dismissed. (a)

L. upon an award in his favor, wrote the following order: "M. will please pay D. or order, the above award of \$289, with interest, which sum I guarantee to said D. for value received, this 10th September, 1822, L." In October, 1822, D. presented the order to M. which was not paid. In August, 1824, he obtained judgment upon the award against M. who at that time was and ever since has been insolvent. In November, 1823, D. informed L. of M's failure, and required payment of L. which was refused. In June, 1824, D. sued L.—*Held*, that he could not recover.

Per FREDERICK COUNTY COURT.

APPEAL from Frederick County Court. This was an action of *assumpsit* commenced on the 28th of June, 1824, by the appellant, Ignatius Davis, against the appellee, Jacob Leab, on a guarantee. The defendant pleaded *non assumpsit*.

1. At the trial the plaintiff offered in evidence the following award, and the order and guarantee thereunder written. "We, the subscribers, arbitrators appointed by *Jacob Leab and Ezra
303 Mantz, in the settlement of accounts, of Jacob Leab against

(a) Approved in *Bayne vs. Suit*, 1 Md. 86; *Tyson vs. Shuey*, 5 Md. 553; *R. Co. vs. Carter*, 59 Md. 311. Cf. *Leopard vs. Canal Co.* 1 Gill, 227. A prayer, "that upon the pleadings and all the evidence in the cause, the plaintiff is not entitled to recover," is entirely too general. No question upon such prayer can be raised in the Appellate Court. It is quite different from the ordinary prayer or instruction, that there is no evidence *legally sufficient* upon which the plaintiff can recover, or that there is no *legally sufficient* evidence of a particular fact. By such instruction the point decided is simply the *legal insufficiency* of the evidence to be considered by the jury. *R. Co. vs. Carter*, *supra*. Rule 4, of the Court of Appeals provides that "in no case shall the Court of Appeals decide any point or question which does not plainly appear by the record to have been tried and decided by the Court below; and no instruction actually given, shall be deemed to be defective, by reason of any assumption therein, of any fact by the said Court, or because of a question of law having been thereby submitted to the jury, unless it appear, from the record, that an objection thereto for such defect, was taken at the trial; nor shall any question arise in the Court of Appeals as to the insufficiency of evidence to support any instruction actually granted, unless it appear that such question was distinctly made to, and decided by the Court below."

Francis Ritchie, from the commencement to the last date of the account; do award that Ezra Mantz pay unto Jacob Leab, or order, thirty days from the date hereof \$289 current money, being the balance we have allowed due Jacob Leab, on the accounts of Francis Ritchie: witness our hands, this 30th of May, 1820: Isaac Mantz, Ns. Turbatt." "Mr. Ezra Mantz will please to pay Ignatius Davis, or order, the above award of \$289 with interest. Which sum I guaranteed to said Davis, for value received, this 10th of September, 1822. Jacob Leab." Having first proved that Jacob Leab the defendant, signed and delivered the same to the plaintiff, at the time it bears date. The plaintiff further proved, that after the delivery to him of said award and order, he called on Ezra Mantz, the person therein named, for payment of said award, some time in the month of October, 1822, who promised to do so, as soon as he could get money enough for that purpose. That the said Ezra Mantz failing to pay the amount of said award and order to the plaintiff, he instituted suit against him in Frederick County Court, to October Term, 1823, upon which he obtained judgment at August Term, 1824, for the amount thereof. He further proved, that at the time said judgment was obtained, and ever since, the said Mantz was, and still is insolvent. That on the first day of November, 1823, the plaintiff called on the defendant and informed him of the failure of said Mantz to pay to him, the said award and order, and demanded payment thereof from the defendant, who refused to pay the same, and thereupon this suit was instituted. The defendant then prayed the Court to instruct the jury, that upon the evidence offered by the plaintiff, he is not entitled to recover. Which instruction the Court, [SHRIVER, and TH. BUCHANAN, A. JJ.] gave. The plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

F. A. Schley, for the appellant, cited *Cutter vs. Powell*, 6 Term Rep. 320; *Cates vs. Night*, 3 Term Rep. 344; *Wright vs. Sampson*, 6 Ves. 734; *Bank of New York vs. Livingston*, 2 Johns. Cases, 409; *Nelson vs. Dubois*, 13 Johns. Rep. 175; *Murray vs. King*, 7 Serg. and Low. 57; (5 Barns. & Ald. 165;) *Campbell vs. Butler*, 14 Johns. Rep. 349; *Tillman vs. Wheeler*, 17 Johns. 326; *Allen vs. Rightmere*, 20 Johns. 365; *Cumpton vs. M'Nair*, 1 Wend. 457; *King vs. Baldwin*, 1 Johns. Ch. 559; * *Biglow's Dig.* 638; *Upham vs. Prince*, 12 Massa. 15.

Palmer, for the appellee, contended, 1. That the contract 305 on which the suit was brought, was to be viewed as an accepted bill of exchange, payable on demand. To constitute a bill of exchange no form of words is necessary; it is sufficient, if there be a direction to the drawee to pay the money to the payee. *Chitty on Bills*, 53. 2. No time of payment being expressed, it was payable on demand.

Chitty on Bills, 345; *Gracie vs. N. Y. Ins. Co.* 8 *Johns. Rep.* 189; *Jackson vs. Ketchum*, *Ib.* 374. 3. Being payable on demand, it should have been presented in a reasonable time, and notice of non-payment given. *Chitty on Bills*, 446; *Darbishire vs. Parker*, 6 *East Rep.* 4, 9; 2 *Caine's*, 369; *Cruger vs. Armstrong and Barnwall*, 3 *Johns. Cases*, 5. 4. Every endorsement contains in itself a guarantee by legal operation. *Hollrow vs. Wilkins*, 1 *Barn. and Cres.* 10; *Chitty on Bills*, 265; *Nicholson vs. Gonthet*, 2 *H. Black.* 609; *Philips vs. Astling et al.* 2 *Taunt.* 206; *Fell on Gua.* 1; 2 *Stark. Ev.* 258; *Warrington vs. Furbor*, 8 *East*, 245; 9 *Serg. and Rawle*, 198; 6 *Connect.* 81, (*New Series*;) *Bridges vs. Berry*, 3 *Taunt.* 130; 3 *Maul. and Selw.* 362; *Bayly on Bills*, *138; *Mitchell vs. Dall*, 2 *H. & G.* 175; 4 *Conn. Rep.* 244; 2 *Caine's Rep.* 345; *French's Executrix vs. Bank of Columbia*, 4 *Cranch*, 161; *Philips vs. Astling et al.* 2 *Taunt.* 206; 2 *Conn. Rep.* 424. 5. But if this is to be considered as an assignment of the award mentioned in the order, still it was necessary to use due diligence, and prove insolvency in the party by whom, according to the award, the money was to be paid. *Parrott vs. Gibson*, 1 *H. & J.* 398; *Boyer vs. Turner's Adm'r*, 3 *H. & J.* 285; 2 *Wash. Va. Rep.* 113; 2 *Call. Rep.* 497; 2 *Henn. and Munf.* 113, (*note*;) 2 *Wilson*, 258; *Clark vs. Young and Co.* 1 *Cranch*, 181; 16 *Serg. and Rawle*, 79. 6. If this is no bill of exchange, then it is a promise to pay the debt of another; and if so, the consideration, as well the promise, must be in writing. *Elliott vs. Giese*, 7 *H. & J.* 457; *Wain vs. Walters*, 5 *East*, 10; *Keonard vs. Bredenburg*, 8 *Johns.* 29; *Fell on Gua.* 337; *Chitty on Bills*, 5.

ARCHER, J. delivered the opinion of the Court. The Act of 1825, ch. 117, had for its object the prevention of the reversal of judgments, unless upon the very questions submitted to the tribunals below; and was intended to remedy the evils flowing from the raising of points above, and assigning the same for error, which were never agitated below, and which, if they had been, could easily have been remedied by amendment of the pleadings, or otherwise, but which remedy was entirely lost to the party after the cause was in the Appellate Court. The Legislature intended to make this Court, so far as regarded the common law cases, strictly an Appellate Court, deciding every cause upon the questions submitted below, and upon none other. If general prayers are allowable, it is obvious that the mischiefs intended to be remedied by the Act will not at all be obviated, because
 307 upon a general prayer, it is impossible * to ascertain from the record, the point which was presented to the Court below, and upon which they decided, and we should be perpetually discussing and deciding points, which may or may not have been acted on in the subordinate Courts. The record here does not show the point upon which the Court acted; in such a case, we can neither reverse nor affirm, but to effectuate the objects of the Legislature, we can

dismiss the appeal, it being their intention, not that we should in such a case, continue the cause on our docket without the power of action, but that we should not entertain the appeal, unless the record showed the point appealed from. In this view of the Act of Assembly, and of the prayer in this cause, it follows that the appeal must be dismissed.

Appeal dismissed.

WATKINS vs. HARWOOD *et al.*—June, 1830.

W. in March, 1827, filed a bill against the administrators of H. who died in 1826, for an account and distribution of his personal estate. After the coming in of the answers, and the cause had been referred to the auditor, the administrators filed with the auditor, as a set-off to W's claim for a distributive share, a mortgage, from her to the deceased of personal property to secure the payment of a debt, containing a covenant for its payment on or before the 1st January, 1810. *Held*, that the plea of limitations was a bar to this mortgage.

By the Act of 1715, ch. 23, the Act of Limitations of this State the recovery of a debt due by specialty is barred after a lapse of twelve years.

It is a settled principle that Chancery follows the law; and acting in obedience to the statute, the plea of limitations is as available in equity as at law, in relation to the same subject-matter. (*a*)

APPEAL from the Court of Chancery. The bill which was filed in this case by the appellant, Ann Watkins, and others, representatives of Benjamin Harwood, deceased, on the 14th of March, 1827, against the * appellees, Richard Harwood of Thomas, and Henry H. **308** Harwood, administrators of the said Benjamin Harwood, and others, was for an account and distribution of the personal estate of Benjamin, who departed this life, as stated in the bill, some time in the month of January, or February, 1826, intestate. Upon the coming in of the answers, the Chancellor at July Term, 1827, passed an interlocutory decree, referring the case to the auditor, with directions among other things, to state "an account of the personal estate of the said Benjamin Harwood in the hands of his administrators, and distributing the same amongst those entitled." After the case had been so referred to the auditor, the administrators of the said Benjamin Harwood, filed a certified copy of a mortgage from the said Ann Watkins to the said Benjamin Harwood, dated February 27th, 1809, of sundry personal property, consisting of negroes, horses, cattle, hogs, beds and bedding, and tobacco, to secure to the said Benjamin the sum of £243 15 shillings, current money, with interest, to be paid on or before the first day of January then next ensuing, with a covenant for the payment of the same at the period mentioned; and

(*a*) Approved in *Sindall vs. Campbell*, 7 Gill, 76; *Teackle vs. Gibson*, 8 Md. 87; *Wilhelm vs. Caylor*, 32 Md. 158; *Knight vs. Brauner*, 14 Md. 7.

the said administrators contended that they had a right to retain the amount thereof, out of the said Ann's distributive share of the estate. To this mortgage, the Act of Limitations was pleaded; and the auditor considering the claim founded upon it barred by the Statute, excluded it from his account.

BLAND, C. at September Term, 1827, rejected the statement of the auditor, and again referred the case to him, being of opinion that the debt secured by the mortgage was not barred by the Statute of Limitations, and ordered him to state an account accordingly. From this order the present appeal was taken.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Boyle and Flusser, for the appellant, cited *Deloraine vs. Browne*, 3 Bro. Ch. Rep. 639, (note;) *Demarest vs. Wynkoop*, 3 John. Ch. Cases, 135; *Trash vs. White*, 3 Bro. Ch. Rep. 291; 1 Coven. Pow. 399 (a); *Giles vs. Baremore*, 5 Johns. Ch. C. 552; 2 Pow. on Mortg. 775; *Hill vs. Chapman*, 11 Ves. 240; *Smith vs. Clarke*, 12 Ves. 480; *Harwood vs. Rawlings*, 4 H. & J. 126. The Act of 1715, ch. 23.

A. C. Magruder, for the appellees, referred to 2 *Caine's Cases in Error*, 200; * 1 *Fonb.* 323; 2 *Fonb.* 267, note (o); 1 *Madd. Ch. Prac.* 428. 429.

BUCHANAN, C. J. delivered the opinion of the Court. This cause lies within a narrow compass. Here the Judge referred to the proceedings, and then said, it is to be observed that this mortgage was not insisted upon, nor set up in the answer, but the amount of the debt supposed to be due claimed for the first time before the auditor, as a set-off against the distributive share of the appellant.

This debt became due and payable by the stipulation and covenant in the mortgage, on the 1st of January, 1810, more than 16 years before the death of Benjamin Harwood, the mortgagee, who died in the year 1826. An attempt has been made in argument, to assimilate this case to that of a proceeding in England, by a mortgagee of land, against a mortgagor in possession for foreclosure; where the right to foreclose, is only barred by the lapse of twenty years, without any payment of interest, or other recognition of the mortgage debt, in analogy to a debt by bond, which is there presumed to be paid, after a lapse of twenty years, without any recognition of the debt. But we do not perceive the analogy between that case and this. It is not a proceeding to foreclose, or in any shape against the thing mortgaged: besides, this is a mortgage not of real estate, but of personal property, very perishable personal property, negro men, horses, cattle, hogs and tobacco. And whether it has perished or not, or whether it ever passed into the hands of

the mortgagee, or has continued to remain in the possession of the mortgagor, no where appears.

By the Act of 1715, ch. 23, the Act of Limitations of this State, the recovery of a debt due by specialty, is barred after a lapse of twelve years. This is claimed as a mere debt, by way of set-off against the distributive share of the appellant, and the mortgage is offered as evidence of that debt; and the question is, whether the plea of the Act of Limitations ought to have been allowed. It is a settled * principle that Chancery follows the law; and acting in obedience to the statute, the plea of limitations is as available in equity, as at law, in relation to the same subject-matter. Here, the subject-matter is a debt of 16 or 17 years standing, (with no recognition of it during the whole of that time) that is claimed to be allowed as such, in the statement of the account by the auditor, an action for the recovery of which, in a Court of law, on the covenant in the mortgage, would be barred by the Act of Limitations. And we think it is equally barred in Chancery, and that the plea of the appellant ought to have been allowed. The decree of the Chancellor, therefore, so far as it disallows the plea of the Act of Limitations by the appellant, is reversed. *Decree reversed.* 311

PURVIANCE, and DORSEY, Adm'r of DORSEY *vs.* BARTON, Adm'r
de bonis non of BARTON.—June, 1830.

Under the Act of 1820, ch. 161, sec. 1, the Chancellor is not authorized to take a bill as confessed, and entirely disregard the testimony which the interlocutory order directed in that Act to be passed, requires to be taken, under an *ex parte* commission to support the allegations of the bill. The final decree in such case must be sanctioned by the evidence taken under the commission. (a)

APPEAL from the Court of Chancery. The bill, which was filed in this case by the appellee, on the 31st of January, 1825, sought to charge the appellants, John Purviance and John R. Dorsey, administrator of Walter Dorsey, with the sum of \$1,233.27, which it alleged the said John and Walter owed to Seth Barton, the intestate of the complainant. As the decision turned upon the true meaning of the Act of 1820, ch. 161, and the merits of the case were not involved, it is not necessary to set out the particulars of the complainant's claim, as presented by the bill. The *subpæna* which issued upon it, was returnable to March Term, 1825; and accordingly at that term, it * was returned, "summoned John Purviance," "*non est* Dorsey." Afterwards, and at the same term, the complain- 312

(a) Examined in *Oliver vs. Palmer*, 11 G. & J. 436. Cited in *Benson vs. Ketchum*, 14 Md. 355.

ant filed the following petition: The petition of the complainant humbly sheweth, that on the 31st of January, 1825, he filed his bill in the above cause, and that *subpœna* was accordingly issued, and hath been returned "summoned" as to the said defendant Purviance, and "*non est inventus*" as to the said Dorsey. That the said John Purviance, hath neglected to appear, or file an answer within the time limited by the rules of Court—the complainant, therefore, prays that a commission, *ex parte*, may be issued, to take testimony in the above case, agreeably to the Act of Assembly in such case made and provided.

BLAND, C. (March Term, 1825.) The defendant, John Purviance, having been returned "summoned," and having failed to appear in person, or by solicitor, according to the exigency of the writ, within the time limited by the rules of Court, it is thereupon ordered and decreed, that the complainant is entitled to relief; but as it does not appear to what relief he is entitled, it is further ordered, that commission issue to Josias Pennington, and Robert Wilson, Jr. to take testimony on the part of the complainant, in support of the allegations contained in the bill.

A commission accordingly issued, under which proof on the part of the complainant was taken, and returned to March Term, 1826. At July Term, 1826, the defendants, Purviance and Dorsey, appeared, the *subpœna* against the latter having at the same term been returned "summoned," after the *subpœna* was so returned, and before the appearance of the defendant, Dorsey, similar proceedings were had against him, as had been pursued against his co-defendant, Purviance. The second commission, and the proof taken thereunder, was returned to March Term, 1827; at that term, neither of the defendants having answered the bill.

313 * BLAND, C., passed the following decree: This case standing ready for hearing on the bill and interlocutory orders, and having been submitted by the solicitor for the plaintiff, the proceedings were read and considered. The commissions heretofore issued to take testimony having been returned, and the defendants not having answered—whereupon it is, on the 25th day of June, 1827, by THEODORICK BLAND, Chancellor, and by the authority of this Court, adjudged, ordered, and decreed, that the said bill of complaint be, and the same is hereby taken, *pro confesso*—and it is further adjudged, ordered and decreed, that the said John Purviance, and the said John Robert Dorsey, administrator of the said Walter Dorsey, forthwith pay, or bring into this Court to be paid, unto the said Thomas B. Barton, administrator *de bonis non* of the late Seth Barton, the sum of \$1,233.27, with legal interest thereon, from the 5th day of February, 1805, until paid, and costs, &c.

From this decree the defendants, on the 18th of July, then following, appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Johnson, for the appellants. *Warfield vs. Gambrill*, 1 G. & J. 503.

Taney, (Attorney-General.) *contra*, referred to 2 Bac. Abr. 176, note (a); 3 Stark. Ev. 1771.

* MARTIN, J., delivered the opinion of the Court. We have carefully examined this case, and think it is not attended with **315** much difficulty, when freed from objections which do not legitimately belong to it, but which have been urged with great ability and ingenuity. It would seem from the argument, the true construction of the Act of 1820, ch. 161, sec. 1, is only to be collected from the interlocutory order it directs. This order is a mere subordinate feature in the law, and its aid is not required to explain that which is clear and manifest without it: give to it what name or character you please, it cannot authorize the Chancellor to take the bill *pro confesso*, and entirely disregard the testimony, which the order itself states to be necessary to a correct decision, and which the Act of 1820 requires, to support the allegations in the bill. Independent of the provisions of that Act, the proceedings in this case appear inconsistent on the face of them. If the bill was to be taken *pro confesso*, and as such would justify a final decree, was it not a mockery to issue a commission to take testimony, when the testimony under it was to have no effect, but to be treated as a mere nullity? It has been conceded by the counsel for the appellee, that unless this proceeding is authorized by the Act of 1820, ch. 161, the decree cannot be sustained. Before the passage of this Act, a commission could not be issued to take testimony until the defendants answered, and the cause was at issue—to prevent the delay consequent upon this course of proceeding, gave birth to the first section of the Act of 1820. By that section it is declared, where a subpoena had been issued, on a bill in Chancery, and returned summoned, as to all, or any of the defendants, and the said defendants, or any of them so summoned, shall fail to appear, or having appeared, shall fail to answer, the Chancellor, upon the application of the * complainant, shall enter an interlocutory decree in such case, and issue a commission, *ex parte*, to **317** take testimony to support the allegations in the bill; which commission shall be issued, proceeded in, and returned, in the same manner, and the testimony returned shall have the same effect, as if issued and returned in the usual way, on answer, general replication and issue, and the Court shall proceed to a final decree in the cause, in the same manner as if the defendant or defendants had appeared and put in their answer. It is difficult to suggest any language which could express in a more clear and explicit manner, the object of the Legislature in passing the law, and the course directed by it to be pursued in the Court of Chancery. Upon the non-appearance of the defendant, or his failure to put in an answer, an *ex parte* com-

mission shall be issued to take testimony—for what purpose? The Act tells us explicitly, to support the allegations in the bill. Why take testimony to support the allegations in the bill, if the bill is to be taken *pro confesso*, and is sufficient to justify a final decree, without any proof of those allegations? But the Act does not stop here—it leaves nothing for construction, but points out, in the most unequivocal terms, the effect that is to be given to the testimony thus returned, and the decree that the Chancellor is to pronounce in the cause. It declares the commission shall be issued, and the testimony taken under it shall have the same effect as if issued and returned in the usual way, on an answer, general replication and issue, and the Court shall proceed to a final decree in the cause, in the same manner as if the defendant had appeared and put in his answer—thus clearly intending to place a cause upon the return of an *ex parte* commission, in the same situation as if a commission had been issued after answer, &c. filed, and that the Court of Chancery should proceed to a final decree in both cases, in the same manner. If the first section of this Act was ambiguous and doubtful, we might call in the second section to aid in its construction—but this we deem unnecessary. The decree in this * case, taking the bill *pro confesso*, was not authorized by the Act of 1820, and it is therefore reversed, and the bill dismissed, but without prejudice.

Decree reversed.

— — — — —
McCAULEY *et al.* vs. GRIMES AND WIFE.—June, 1830.

M. purchased a tract of land, which at his request was conveyed to his son C. At this time C. was a minor, and did not attain his majority until after his father's death. M. bequeathed pecuniary legacies to his son H. and other children, except C. After M's death the children entered into a parol agreement to divide equally the real and personal estate of their father, and in pursuance thereof, C. conveyed this land to H. then a married man, in fee, who gave bonds to the children for, and executed a mortgage of the land to them, to secure the payment of, their several shares of their father's estate. The deed, mortgage and bond were all executed at the same time. Upon H's death it being ascertained that the land was insufficient to pay the mortgagees, if subject to a claim of dower in favor of H's widow. *Held.* That she was not entitled to dower.

(a)

There is no general rule, in strictness, that in cases of instantaneous seisin the widow shall, or shall not, be entitled to dower. This must depend as well upon the character of the seisin, as its duration.

Where a man has the seisin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed.

— — — — —
(a) Relied on in *Rawlings vs. Lowndes*, 34 Md. 648; *Heuveler vs. Nickum*, 38 Md. 277; *Glenn vs. Clark*, 53 Md. 606; *Maybury vs. Brien*, 15 Peters, 39.

Where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed. Where one is seized for the combined use of himself and others, and his interest, real or contingent, is not susceptible of any particular ascertainment, but is necessarily undefined, and is to be postponed until the gratification of all the uses to which his seisin is subservient, it is not a case of beneficial seisin for his own use, so as to endow his wife to the prejudice of the other uses.

APPEAL from Washington County Court. This was an action of dower, commenced on the 2d of November, 1825, by James Grimes, and Catharine his wife, (the appellees) against the appellants, John McCauley and others, for one-third part of a tract of land called "Conococheague Manor," and of a tract called "Number 319 * Five," one of the reserves of said manor, situate in Wash-
ington County. There was a judgment, by confession, for the demandants, subject to the opinion of the County Court, on the following statement of facts:

"It is admitted that Charles McCauley, deceased, purchased in his life-time, the land in the declaration mentioned, from a certain Frisby Tilghman, who, at his request, conveyed the same to his son, Charles McCauley, Jr. in fee simple, by deed dated August the 20th, 1808, in consideration of the sum of £4,495 10 shillings. That at the time of the execution of said conveyance, Charles McCauley, Jr. the grantee, was a minor, and did not attain his majority until after the death of his father. That Charles McCauley the elder deceased, bequeathed to his son Hugh, a legacy of £1,000, and to each of his other children, except his son Charles, the sum of £500. That after the death of the elder Charles McCauley, and the arrival at age of his son Charles McCauley, Jr. he, together with his brothers and sisters, entered into a parol agreement that they would divide and share equally, the real and personal estate of their father; without regard to the superior value of the property given to Charles over the rest, by the deed from Tilghman before mentioned. The precise terms of the agreement, however, were not known, until all the parties met at the office of counsel, on, or shortly before the 8th of February, 1822, when the counsel was informed of the agreement which had been entered into, and he was requested to have a deed prepared from Charles McCauley, Jr. to Hugh McCauley, for the land in the declaration mentioned, for the purpose of carrying the said agreement into effect; which was, that Charles should convey by deed of bargain and sale to his brother Hugh, the land which had been conveyed to him, Charles, by the aforesaid Frisby Tilghman; and that Hugh, in consideration thereof, should pay to his brothers and sisters, certain stipulated sums of money; and to secure the payment of the same, he should at the same time that he received the deed from Charles, execute a mortgage to * them of the same lands, together with his bond for the payment of the several sums of 320

money, which it was agreed each should have as their respective portions of their father's estate. That in pursuance of said agreement, the deed and mortgage, (in which the deed is recited) and bonds were all executed, at the same time, on the 8th of February, 1822, by the said Charles and Hugh McCauley. The marriage of the demandant Catharine, to Hugh McCauley, the grantee in the deed from Charles, prior to its execution, and prior to the execution of the mortgage, and the death of Hugh subsequently, were also admitted. It was further admitted, that the said Hugh McCauley made certain payments on account of the said bonds and mortgage, during his life, amounting to about \$2,500, and that about the same amount has been paid since, on the same account, by his personal representative. That in the division of the father's estate, the proportion of the said Hugh in the land was taken into the estimation, and the aforesaid mortgage and bonds to his brothers and sisters were executed for the balance. That said Hugh made valuable improvements on said land, and that it will not sell for more than the balance due the mortgagees, especially if encumbered with the widow's dower. It was further admitted, that James Grimes, one of the appellees intermarried with Catharine, the other appellee, prior to the institution of this suit. If upon the preceding statement, the County Court should be of opinion, that the seisin of the said Hugh McCauley, was such as to entitle his widow to dower of the said lands, then judgment to be entered for the demandants; otherwise for the defendants, either party reserving the right to appeal, or sue out a writ of error. The County Court gave judgment for the demandants, and the defendants appealed to this Court.

The cause came on to be argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Yost, for the appellant, cited 2 *Black. Com.* 124; 1 *Thos. Coke Lit.* 124, note (G); *Powel on Contracts*, 410; 2 *Blk. Com.* 331; *Peterson vs. Clarke*, 15 *Johns.* 205; *Roe, on demise of Noden vs. Griffiths et al.* 4 *Burr.* 1962; *Vaughan vs. Atkins*, 5 *Burr.* 2787; *Jackson vs. Dunsbagh*, 1 *Johns. Cases*, 95; 4 *Massa.* 556; *Stow vs. Tift*, 15 *Johns.* 463; *Clark vs. Munroe*, 14 *Massa.* 351; 1 *New Hamp.* 75; *Bingham on Infancy*, 11; *Jackson vs. Matsdorf*, 11 *Johns.* 97, 108; *M'Cracken vs. Wright*, 14 *Ib.* 194; *Holbrook vs. Finney*, 4 *Massa.* 569; *Stow vs. Tift*, 15 *Johns.* 459; *Jackson vs. Dewett*, 6 *Cowen*, 316.

Price, for the appellee, cited 2 *Bac. Ab.* 371, and note; 1 *Thos. Coke*, 576, (*London Ed.*;) *Bingham on Coverture*, 313, 314; 2 *Black. Com.* 124; *Bingham on Coverture*, 314; *Coke Lit.* 576, (note;) *Pow. on Contracts*, 410; * 2 *Bac. Ab.* 371; *Clark vs. Munroe*, 14 *Massa. Rep.*

323 351; *Thompson, C. J. in Stow vs. Tift*, 15 *Johns.* 464; *Nash vs. Preston, Cro. Ch.* 191; *Ford vs. Philpot*, 5 *H. & J.* 315.

ARCHER, J. delivered the opinion of the Court. The record presents in effect the same principle for adjudication, which has here-

tofore come before the Courts in several States of the Union. In *Holbrook vs. Finney*, 4 *Massa. Rep.* 566, it was decided that a conveyance in fee, and a conveyance by the grantee to the grantor by way of mortgage being considered as parts of the same transaction, did not give to the grantee such a seisin as entitled his wife to have dower in the granted premises. And in *Clark vs. Munroe*, 14 *Mass.* 352, where the mortgage was made to a third person, at the same time with the deed to the mortgagor, the same determination was had; in each of those cases the deeds were executed in pursuance of a previous agreement between the parties. In South Carolina the same doctrine had prevailed before, as will be seen by a reference to *Bogie vs. Rutledge*, 1 *Bay*, 312; this decision has been recognized, and approved in that State in a very recent decision. *Trustees of Frazier vs. Centre & Hall*, 1 *M' Cord*, 279; these determinations have been followed in New York. In *Stow vs. Stiff*, 15 *Johns.* 458, the case in 4 *Mass.* 566, was cited and approved, and a judgment * given in conformity with it; in the latter case, however, no agreement was proved, further than could be inferred from the execution of the conveyance and mortgage, and the internal evidence they furnished. In Pennsylvania too, the same doctrine prevails—in *Reed vs. Morrison*, 12 *Sergeant & Rawle*, 70, it was adjudged that as against the mortgagee for the purchase money, the widow had no such seisin as would entitle her to dower. So far as we have examined the American cases, the decisions appear to be uniform against the widow's right to dower, unless subject to the payment of the purchase money secured by mortgage—and Chancellor Kent, in his recent treatise on the law of real property, approves these determinations. 4 *Kent's Com.* 38, 39. The cases in Massachusetts and New York, proceed on the doctrine of instantaneous seisin. The deed and mortgage were looked upon as constituting but one contract, bearing the same date, and delivered at the same time; and that as no interval of time intervened, between the taking and rendering back the fee, the case might be assimilated to the conusee of a fine, whose wife would not be entitled to dower, because by the same fine the estate is rendered back to the conusor; it was there considered as merely *in transitu*, and not resting for an instant; the grant and render being one entire act. But perhaps there is no general rule in strictness, that in cases of instantaneous seisin the widow shall or shall not be entitled to dower; this must depend as well upon the character of the seisin, as its duration; when a man has the seisin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed; where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed. 1 *Thomas Coke*, 665, 666, note G; *Preston Est.* 546; 2 *Bac. Abr.* 371; here the husband was the mere instrument to carry into effect the purposes of the grantor—he takes the fee; that he may instantaneously pass

it out of him to certain mortgagees who are the objects of the grantor's bounty, * and whom he designates as the persons to
325 receive the purchase money; and it is not a portion of the lands by metes and bounds, or any undivided part of it, that he is thus the instrument for passing away, but it is the fee in the whole land; and it is done *ex uno flatu*. But it is supposed that he was beneficially seised for his own use; the situation in which the grantee stood could not, we apprehend, bring him within the operation of this general rule; he was seized beneficially for the use of his brothers and sisters, and whether his interest was ultimately to be beneficial, was entirely contingent, and dependent upon the capacities of the estate to meet the claims of his brothers and sisters. This we apprehend is not the kind of beneficial interest, the seisin of which, to his own use, would entitle the wife to dower—he was not in fact within the words or spirit of the rule, for he was not seized beneficially for his own use, but for the combined use of himself and others, and his interest, real or contingent, was not susceptible of any particular ascertainment, but was necessarily undefined, and was to be postponed until the gratifications of all the uses to which the lands were made subservient.

It is remarked by Kent, 4 *Com.* 38, 39, "That a transitory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of the conusee of a fine, is not sufficient to give the wife dower; the same doctrine applies when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person to secure the purchase money, in whole, or in part; dower cannot be claimed as against rights under that mortgage—the husband is not deemed sufficiently or beneficially seized by such an instantaneous passage of the fee, in and out of him, to entitle his wife to dower as against the mortgagee, and (he further remarks) this conclusion is agreeable to the manifest justice of the case."

There is no case in the English books which militates against these doctrines, unless it should be the case of * *Nash vs.*
326 *Preston*, *Cro. Ch.* 191; but if the interpretation given to it by the Courts in Massachusetts and New York, that the re-demise was not made at the time of the deed of bargain and sale, be found to be correct, it will not interfere with the American cases. The justices to whom in that case the question of dower was referred, say it "was intended they should have it re-demised immediately." It is fair to infer from this declaration, that the re-demise was not executed at the same time with the deed of bargain and sale, and if it was not, it does not at all conflict with the American cases.

Judgment reversed.

STOCKETT vs. WATKINS' Adm'rs.—June, 1830.

A. was Adm'r d. b. n. of S., and Ex'r of L., the widow of S. In an action brought against him for the use and occupation of land, and hire of negroes, it appeared that the plaintiff had a deed for certain land and negroes from S. who retained possession until his death, when his widow, who was his sole devisee and executrix, continued that possession, and shortly after filed her bill in Chancery to have the plaintiff's deed, which was absolute in terms, decreed a mortgage; before that cause was decided the widow also died. The defendant, as her Ex'r, and as Ad. d. b. n. of S. and in conjunction with her devisee of the land, filed a bill of revivor, and after much litigation, the plaintiff's deed was sustained. The defendant had, in fact, entered upon and rented out the land, and used the negroes conveyed to the plaintiff, after the widow's death, and had frequently said, if the bill was decided in favor of the plaintiff, the rent of the land, and the hire of the negroes, would be payable to him. Upon the decision of the cause, the land and negroes were delivered up to the plaintiff, and the accruing rent of that year paid to him by the tenants. It did not appear under what circumstances the defendant had originally entered into the land. *Held*, that the widow's admissions, that she held the land and negroes as the plaintiff's tenant, and by his permission, were not competent evidence to charge the defendant; that the evidence was not sufficient to warrant the inference, that the relation of landlord and tenant subsisted between the plaintiff and defendant, the facts and circumstances not * being such as usually attended a permissive holding; but that he was responsible for the hire of the negroes, during the time he had them. **327**

To maintain the action for use and occupation, it is not necessary for the plaintiff to prove an express contract with the tenant, when he first takes possession, nor an express reservation of a certain rent, nor that the tenant has paid rent. It may be maintained on an implied undertaking where the permissive holding is established; and if it appears that a certain rent was reserved, the reservation may be used to regulate the damages. But if one enters as a trespasser, the action for use and occupation cannot be maintained. (a)

The law sometimes implies contracts, but never when there is an express contract, or facts exist wholly inconsistent with the contract to be implied. (b)

Where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the *tort*, and sue in assumpsit for the proceeds; and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the *tort*, and then recover their value for the time of their detention in assumpsit.

ERROR to Anne Arundel County Court. This was an action of assumpsit, commenced on the 11th of October, 1825, by Nicholas

(a) Approved in *Lloyd vs. Hough*, 1 Howard, 160. Cited in *Kiddall vs. Trimble*, 1 Md. Ch. 148. See *Stoddert vs. Newman*, 7 H. & J. 190.

(b) Approved in *Franklin vs. Waters*, 8 Gill, 328.

Watkins of Thomas, (the intestate of the appellees,) in his life-time against, Joseph N. Stockett the appellant, for the use and occupation of land, and for the labor and services of certain negroes. Upon the death of the said Nicholas Watkins of Thomas, Rachel H. Watkins, and Benjamin Watkins, his administrators, (the appellees) appeared, and were made parties to the suit. The defendant pleaded, *non assumpsit, non assumpsit infra tres annos*, and *actio non accrevit, &c.* Issue to the first, and general replication and issues to the last pleas.

1st Exception.—At the trial the plaintiff having read the proceedings in Chancery, in the case of *Stockett vs. Watkins*, (6 H. & J. 435,) and the decision of the Court of Appeals, (which by consent are made parts of this bill of exceptions) gave in evidence by one John Beard, that in the year 1822, he hired Sam the elder, (one of the slaves mentioned in the deed of 28th June, 1816, which was read in evidence from the proceedings * in Chancery,) from Joseph N. **328** Stockett, the defendant. And on the 12th October, 1825, settled with S. for his hire, at thirty dollars per annum; that he objected to the amount, but S. replied, "Don't ask me to take off the wages; I cannot do it, for I have to pay it all away to Watkins." That afterwards in a subsequent conversation, the witness heard the defendant say, that all the rent of the place, and the hire of the negroes the witness had employed, he S. had to pay away to W. as the case was then decided. The rent of the place was one thousand pounds of tobacco in 1819, and 1820, by valuation. That John Stockett was in possession of this place in 1816, and before, and then sold it to W. the original plaintiff. That after his death, Mrs. Lurana Stockett, his wife, whom he constituted his executrix, and sole devisee, continued in possession of the land and negroes until her death, and that after her death the defendant, her executor, entered and took possession of the property, and hired out the farm to Nicholas Knighton, one year, for one thousand pounds of tobacco; that Mrs. S. died in 1818, having made her will, which appears to have been proved 31st October, 1818. And the plaintiffs then called James Davidson, who proved, that he was called upon by the defendant S. to value the rent of the farm in 1821, and valued it at one thousand pounds of tobacco. And it was rented by S. for that sum to Knighton. In 1825, the witness rented the place from S. the defendant, at the same price. That S. the defendant, told him when he took possession, that the rent must be paid to him, or to W. the intestate, according to the decision of the cause in the Court of Appeals.

The plaintiff's counsel then offered to prove, that the defendant entered under Mrs. Stockett, claiming in her right, and that she had declared to the witness, Stephen Beard, that she had entered upon the land and held the negroes, under and by the permission and consent of the intestate W. and acknowledged that she held both the land and negroes, as the tenant of the plaintiffs. And the **329** plaintiffs * further offered to prove, that the defendant, after

her death, had entered and held claiming in her right, and further offered to prove the value of the land and negroes during the time the defendant had held the same after the death of Mrs. S. by himself or his agents. The defendant by his counsel objected to any proof being offered in this cause relative to admissions or acknowledgments by Lurana S. in connexion with the other evidence as offered to be proved to the jury, and the Court [KILGOUR and WILKINSON, A. J.] refused to let the same be given in evidence to the jury, being of opinion that the defendant in this cause was charged in the declaration with his own individual acts, in his individual capacity, and that the plaintiffs could not be permitted by parol proof to establish a relation with another, to make the defendant answerable representatively for the acts of such other person, and of which relation the record exhibited no evidence. The plaintiffs excepted.

2d Exception.—The plaintiffs having given in evidence, in addition to the matters stated in their first bill of exceptions, the annual value of the land and negroes for which this action is brought, rested their cause. Whereupon the defendant offered in evidence a writ of replevin, issued on the 8th April, 1818, out of Anne Arundel County Court, by Nicholas Watkins of Thomas, against Lurana S. with the avowed object of showing that Mrs. S. was then in the adverse possession of the negroes in said writ mentioned, which were admitted to be the same conveyed by John S. to Nicholas W. of T. by the deed of 28th June, 1816, on which said writ was endorsed “replevied and delivered” by the then sheriff of Anne Arundel County, Robert Welch of Ben. who being thereupon called by the plaintiffs, testified, that on the service of the said writ, by order of N. W. of T. and with his permission, the said negroes were not taken out of the possession of Mrs. S. but still left with her as the witness had found them. And the * witness informed Mrs. S. at the time of service, that his orders were still to leave them in her possession, and she 330 joyfully acquiesced therein, and appeared to be thankful. And thereupon the docket entries in the said cause were produced by the defendant, by which it appeared that a *retorno habendo* bond was filed in said cause, on the 28th April, 1818, and “property returned,” entered by the clerk, and the said bond was produced, and that the said cause was entered “discontinued by consent, without costs,” at October Term, 1822. And thereupon the plaintiffs offered to prove, that during the time Mrs. S. was in possession of the said negroes, both before and after the said replevin was issued, she admitted and declared to the witness, that she held and enjoyed the same under the permission and consent of the said Nicholas W. of T. To which evidence so offered, the defendant by his counsel objected, but the Court overruled the objection, being of opinion that the same was competent evidence in this cause. The defendant excepted.

3d Exception.—On the testimony contained in the preceding exceptions, the defendant by his counsel prayed the Court to instruct the jury, that if they should be of opinion from the evidence, that the plaintiff is entitled to recover in this suit, he can only claim under the issues and upon the evidence in this cause, so much of the rent for the land, and of the hire of the negroes, as became due within three years before the institution of this suit. But the Court refused to give the instruction, being of opinion that the declarations of the defendant, proved by the witnesses as stated in the first bill of exceptions, if believed by the jury, prevented the plea of limitations from being a bar to any part of the claim, if the jury should be of opinion that the plaintiffs have a claim, the Court thinking the whole evidence proper to be left to the jury. The defendant excepted.

4th Exception.—In addition to the matters set forth in the preceding exceptions of plaintiffs and defendant, the defendant for the purpose of proving that the relation of * landlord and tenant
331 did not exist between the original plaintiff and the defendant, before October Term, 1822, offered in evidence the proceedings in an action of ejectment brought to April Term, 1818, by the original plaintiff, against Lurana Stockett, as the tenant then in possession of certain lands, being the same lands for the use and occupation of which this action is brought. And proved that the said suit was continued in the said County Court, until April Term, 1819, when the death of the original party was suggested, upon which a *subpoena* was issued, against one Richard Stockett, the devisee of said Lurana S. who appeared, was made a party and the cause was continued till October Term, 1822, when the suit was discontinued by consent, without costs; to the admissibility of which evidence the plaintiffs objected, because the said record was between different parties, and for other property, and because the said ejectment in its existing state could not legally avail the defendant in bar of the plaintiff's claim, on the issues joined in this cause, but the Court overruled the objection and admitted the evidence. The plaintiffs excepted.

5th Exception.—The plaintiffs then gave in evidence to the jury, a deed from one John Stockett to the plaintiff's intestate, dated the 28th June, 1816, for two tracts of land called Doden and Bridge Hills, and six negroes therein, named Sam, &c. Whereof the said Stockett was then seized and possessed, which deed was duly executed, acknowledged and recorded, and is an absolute deed on its face, for the consideration of \$800, acknowledged to be paid for the said conveyance. That the said S. and his wife Lurana S. who were living on the said plantation, at the time of the grant aforesaid, still continued to live there, and to retain possession of the said negroes, until John S's death, on or about the 1st March, 1818. Immediately after his death, his widow still continuing on the place, and in possession of the negroes aforesaid, sent for her relation Stephen Beard,

a competent witness, who proved the same, and told him in great distress that he * understood Mr. Nicholas Watkins of Thomas, had an absolute deed of all the land and negroes, and that she desired the witness to go for Mr. W. and ask him to come and see her. That he accordingly notified Mr. W. who came there, and being asked by Mrs. S. if it was true that her husband had given him an absolute deed for the land and negroes aforesaid, said it was so, and produced the deed. That Mrs. S. was greatly distressed, and declared she was friendless, that she did not care so much for the land, but that she was desirous to live there as long as she lived. And that she was much attached to the negroes she had brought up, and intended to have set them free at her death. That Mr. W. assured her that she was not friendless. That he had always been a friend to her husband, and intended to be her friend; that she might still continue on the place as long as she lived, and he would not disturb her; but as to the negroes, that she had a dower right in the land, which if she would consent to sell at that time, as he W. had a good offer therefor, she might have the negroes, and do what she pleased with them; upon which Mrs. S. appeared to be perfectly satisfied, and W. went away, and the witness believed all matters adjusted, until shortly after he learned that Mrs. S. did not intend to comply with her promise to W. and had brought suit in Chancery against him. The plaintiffs then read in evidence the case in 6 *H. & J.* 435, by consent. By these proceedings it appeared among other things, that the original bill was filed by Lurana S. executrix, and sole devisee of John S. on the ——— day of ——— 1818, with two exhibits, the deed above mentioned, and the will of John S. which are to be deemed parts of this bill of exceptions. That Mrs. S. the complainant, died on or about the 31st of October, 1818, having made her will, which also is to be used from the said proceedings as there exemplified, and that subsequently, the defendant, and Richard L. Stockett, her devisee, became parties to the said proceedings. The plaintiffs further gave in evidence to the jury, that soon * after Mrs. S's death, the defendant took possession of the plantation, and assumed the control and disposal of the negroes, and held the same by himself, or his under tenants, and agents, until July, 1825. And the plaintiff then proved all the facts in relation to the valuation and renting of the land, and use and hire of the negroes mentioned in the other exceptions. And that the witness has since paid the rent of that year accordingly to Mr. W. without any objection from the defendant, who has never asked him for the said rent. The plaintiffs further gave in evidence, that in the month of July, 1825, the defendants delivered up the possession of the said land and negroes, to the plaintiffs' intestate, as the said cause was then decided in his favor in the Court of Appeals. And the defendant gave in evidence to the jury a writ of replevin and proceedings under it, as mentioned in the second bill of exception—

and those in the action of ejectment in the fourth exception. Whereupon the plaintiffs called Stephen Beard to prove the declarations and admissions of Mrs. S. while she was in possession of the said property, as to the nature and character of her possession, which evidence was then admitted by the Court, and given to the jury as herein before stated, and then both parties rested the evidence in this cause.

The plaintiff's counsel then prayed the Court to instruct the jury, upon all their evidence contained in the 5th bill of exceptions, as follows:

1. That it was sufficient in law, to authorize the jury to infer the relation of landlord and tenant, as existing between W. and this defendant, during the possession of the said S. as aforesaid, and that the said S. held the said land and negroes, under the title of W. and with his concurrence and permission; and that it is not necessary in law for the plaintiffs, in order to maintain this action, to prove an express contract with S. at the time S. first took possession, nor any **334** express reservation of a certain rent, * nor the actual payment of any rent by S. to W. or to the administrators of W. since his death.

2. If the jury believe the several matters stated in the foregoing prayer, that the mere suing out a writ of replevin by W. against Lurana S. for the said negroes in April, 1818, which was afterwards discontinued by consent without costs of both parties, is not sufficient evidence in law, to establish an adverse possession of the said negroes, against W. under which the defendant can protect himself against this action.

3. That if the defendant relies upon the writ of replevin, and the proceedings in that case, to prove the adverse possession of Mrs. Lurana S. of the said property, the declarations and admissions of Mrs. S. while she was in possession, relative to the nature and character of her possession, or that she held by permission of W. are competent legal evidence for the plaintiffs to rebut such a defence, and to show if the jury believe such evidence, that she held and claimed under W.

The defendant by his counsel objected to said prayers, and prayed the Court to give the following instructions: 1. That if the jury believe from the evidence in this cause that the original plaintiff in this suit, on the 8th April, 1818, instituted an action of ejectment in Anne Arundel County Court, against the then tenant in possession, to recover the lands, for the use and occupation of which this suit is brought, that upon the death of said tenant in possession, *subpoena* was issued against R. L. S. her devisee, who appeared in virtue of said *subpoena*, and was made a party to the suit, that the same was continued till October, 1822, when it was entered discontinued without costs by consent, then the plaintiffs are not entitled to recover in this action, for profits of said land pending the said suit.

2. If the jury are of opinion from the evidence, that on the 8th April, 1818, the plaintiff issued out a writ of replevin against Lurana S. executrix of John S. and * who possessed said negroes as executrix as aforesaid, to recover the negroes for the hire of which this action is brought,—that the said suit was continued till the death of Lurana S. was suggested,—and who died without having closed her administration,—that *subpœna* issued against her executor, the defendant in this cause, who was administrator *d. b. n.* of John S. who claimed the said negroes as administrator *d. b. n.* of John S.—that the cause continued till October Term, 1822, when it was entered, discontinued by consent without costs, then the plaintiffs are not entitled to recover in this suit for the hire of said negroes, during the time aforesaid.

The Court instructed the jury as prayed for by the plaintiff's counsel, and refused to give the instructions as prayed by the defendant's counsel, except so far as those are modified by the instructions already given. Whereupon to the instructions given, and to the refusal by the Court to instruct the jury as prayed by the defendant's counsel, the defendant excepted. And the verdict and judgment being against him, the present writ of error was sued out.

A question was made, and argued in the Court of Appeals, upon the manner in which the judgment was entered up in the County Court: The judgment was on verdict for \$1,044.51, and the form pursued was as follows: "Therefore it is considered by the Court here, that the said Rachel H. and Benjamin Watkins, administrators as aforesaid, recover against the said Joseph N. Stockett, the sum of \$10,000 current money, (the damages laid in the *narr.*) to be released on payment of \$1,044.51, (the sum found by the jury) with interest, &c."

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Magruder and Alexander, for the appellant, cited the Acts of 1809, ch. 153; 1811, ch. 161; *Fisher vs. State, use of Johnson*, 1 H. & J. 416; *Tilghman vs. Stewart*, 4 H. & McH. 163; *Purl vs. Duvall*, 5 H. & J. 69; *Riggin vs. Patapsco Co.* 7 H. & J. 294; 2 Salk. 515; *Cro. Jac.* 644; *Jackson vs. Aldrick*, 13 Johns. Rep. 106; *Birch vs. Wright*, 1 Term Rep. 378; *Jackson vs. Fuller*, 4 Johns. 215; *Jackson vs. Tyler*, 2 Johns. Rep. 444; 2 *Wheat. Selw.* 1083, note (3); 8 Term Rep. 327; *Jackson vs. Deyo*, 3 Johns. Rep. 422; 2 Johns. Ca. 353; *Smith vs. Stewart*, 6 Johns. Rep. 46; *Bancroft vs. Wardell*, 13 Johns. 489; 2 Taunt. 145.

Johnson and Randall, for the appellees, cited 2 Harr. Ent. 87; 13 Johns. Rep. 106; 2 Johns. Rep. 75; 2 Sand. Ev. 487; 5 Barn. and Ald. 604; 5 Cowen, 123, 128; 3 Johns. Rep. 499; 2 Term Rep. 53; 1 Cowp. 290; Cowp. 246; 2 Camp. 14; * *Oliver vs. Gray*, 1 H. & G. 204.

EARLE, J. delivered the opinion of the Court. There were five exceptions taken on the trial of this case, which is an action for the use and occupation of land, and for the work, labor, and services of negroes, brought by the administrators of Watkins against Stockett. The first and fourth were filed by the plaintiffs, and were not used by them. The remaining three have had a full share of our attention. The fifth exception contains a recapitulation of all the evidence examined by either party. On this exception, three prayers were submitted by the plaintiffs, and two by the defendants, and all were decided favorably to the former. They will all be adverted to, in the opinion about to be pronounced by this Court. The plaintiffs repeated all the evidence adduced on their part, and asked the Court to instruct the jury, if they believed it, that it was sufficient evidence in law, to authorize them to infer the relation of landlord and tenant, as existing between Watkins and the defendant, during the possession of Stockett, and that Stockett held the land and negroes, under the title of Watkins, and with his concurrence and permission; and

339 that it is not necessary in law, for the * plaintiffs, in order to maintain this action, to prove an express contract with Stockett, at the time Stockett first took possession, nor any express reservation of a certain rent, nor the actual payment of any rent by Stockett to Watkins, or to the administrators of Watkins, since his death. The last part of this instruction is certainly correct. To maintain this action for use and occupation, it was not necessary for the plaintiffs to prove an express contract with the defendant at the time when he first took possession, nor an express reservation of a certain rent, nor that the defendant has paid rent to the plaintiffs, or their intestate. Such an action may be maintained on the implied undertaking, where the permissive holding is established; and if it appears in the evidence that a certain rent was reserved, the reservation may be used to regulate the *quantum* of damages. The former part of the instruction is of a different character, and exhibits to view the principal point in the cause. It informs the jury, that the evidence, as repeated by the plaintiff's prayer, is sufficient in law to authorize them to infer the relation of landlord and tenant, as existing between the parties, during the possession of the defendant, and that he held the land and negroes, under the title of Watkins, and with his concurrence and permission.

Every part of this evidence we have examined carefully, and we cannot perceive in any part of it, nor in the whole considered together, the presumptive quality ascribed to it. In a word, it does not appear to us sufficient in law, to justify the inference drawn from it by the County Court. In the fall of 1818, Joseph N. Stockett entered upon, and took possession of this land, and held it by himself and others, until the year 1825. By what authority, and in what character he possessed it, there is not a particle of direct testimony in the record to show. If he entered and possessed it as a trespasser,

there is an end of this question. Out of this tortious proceeding no holding with permission can ever be inferred. If he came in as a trespasser, say the Court, in *Harwood vs. Cheeseman*, 3 Serg. & Rawl. * the plaintiffs cannot recover in an action for use and occupation. And in 6 *Johns. Rep.* 49, it is said by the Court, that **340** the purchaser who refused to perform his contract, changed himself into a trespasser, and in that character was liable to be turned out and made responsible for mesne profits.

In January, 1819, Joseph N. Stockett united with Richard Stockett in reviving Lurana Stockett's bill in equity, against Nicholas Watkins, and although as her executor, and as administrator *de bonis non* of John Stockett, it was perhaps his duty so to do, to redeem the negroes transferred or pledged by the deed of 1816, he has nevertheless been considered as having taken her place in the contest, and succeeded to the possession of the land in her right.

We will take a short view of the subject in this light, and see whether it will conduct to a different conclusion than that already stated. Whatever the early impressions of Lurana Stockett might have been with respect to the rights of Nicholas Watkins, under the deed from her husband, in the month of April or May following his death, she filed the bill in Chancery against him, asserting the deed to be nothing more than a mortgage, which she offered herself ready to redeem, and denying positively the absolute rights which he claimed under it. The legal warfare by her thus commenced was prosecuted with ardor by Joseph N. Stockett, until the year 1820, when he succeeded in obtaining from the Chancellor an interlocutory decree, pronouncing the deed in question to be a mortgage. With cheering prospects before him, he pressed the case on to a final decree, and in 1822 Chancellor JOHNSON also declared the deed of 1816 to be nothing more than a mortgage. By Watkins, the case was then taken to the Court of Appeals, where it was met by Stockett in the spirit such a struggle is calculated to inspire. He employed able counsel to defend the appeal, and continued unceasingly to assert that the land he possessed was pledged only, and not conveyed absolutely to Nicholas Watkins; and in this assertion **341** he * persevered, until undeceived by the Court of Appeals, in 1825. What ground is furnished by all this, it may be asked, on which to raise a legal inference that Joseph N. Stockett held the land and negroes all the time he possessed them, under the title of Nicholas Watkins, and with his concurrence and permission. They are not facts and circumstances which usually attend such permissive holding, and this is the best test, it is said, by which to try a legal presumption. They rather appear to us of an opposite character, and to manifest the actual posture of Joseph N. Stockett to have been inconsistent with the supposed tenancy to Nicholas Watkins. His equity proceeding had assumed for him the attitude of a mortgagor offering to redeem the mortgaged premises; and he main-

tained himself in it until the close of the controversy, and in this situation constantly held the disputed property. How then is it possible, in the teeth of this fact, to infer the relation of landlord and tenant between him and Nicholas Watkins, during the same period, and that he enjoyed by his permission? The law sometimes implies contracts, but never where there is an express contract, or facts exist wholly inconsistent with the contract to be implied. But it has been thought that the Court's instruction on the first prayer is supported by the disclosures made by Joseph N. Stockett to James Davidson and John Beard, a little before, and after, the reversal of the decree in the Court of Appeals. We will briefly advert to them to show their inadequacy for this purpose. When Joseph N. Stockett was about to lease to James Davidson, early in the year 1825, he said to him that the rent would have to be paid to him or Nicholas Watkins, as the case between them eventuated in the Court of Appeals, at the next June Term, when it was expected to be finally decided. By this he said nothing more than to repeat the disposition the law would make of the accruing rent, in the event of the success of Nicholas Watkins; for it is exceedingly clear, that the tenant at the end of the year could not safely pay to any, except the established owner of the land. It bears * but little on the subject

342 under review, having no tendency, that we can perceive, to aid the presumption that the relation of landlord and tenant existed between Nicholas Watkins and Joseph N. Stockett, during the pendency of their suit in equity, and in the Court of Appeals. The disclosure to John Beard is pretty much of the same cast, and appears to us to have little to say to the point before us. It took place in October, 1825, at which time Joseph N. Stockett refused to abate the hire of negro Sam, and said he had to pay it to Nicholas Watkins, and that all the rents of the place, and the hire of the negroes, were to be paid to him, as the suit between them was determined. The event of the suit had rendered him accountable to Nicholas Watkins for the hire of the negroes, and the rents of the land, and there is to be recognized in what he said nothing more or less than an acknowledgment of his accountability to him. It affords no foundation on which to raise an inference that he was to be answerable for those demands in any particular form of proceeding, and not the slightest to justify a presumption that he held from Nicholas Watkins permissively from 1818 to 1825, to which holding there is not the smallest allusion. His liability he spoke of in general terms, and it would be a most strained and forced construction of his language to deduce from it a permissive occupation by him of these premises, which his conduct, for a series of years together, flatly contradicts.

To these sentiments of the Court, in relation to the instructions on the first prayer of the plaintiffs, the opinion of the County Court is opposed, on the first prayer submitted by the defendant. They

refused on this prayer to direct the jury that the plaintiffs were not entitled to recover in this action for the profits of the land, pending the ejectment instituted by Nicholas Watkins against Lurana Stockett in 1818, and discontinued in 1822; maintaining, as they did, the converse proposition, that the action was sustainable for the profits during the same period. This refusal of the Court below, we must then necessarily disapprove of, and * we will add no other remark upon this part of the subject. The two other **343** prayers on behalf of the plaintiffs, as well as the last offered by the defendant, refer to the negro property, and will be disposed of by us in a few words. They rest upon different principles, and we entirely concur with the Court, that the action as to the work and labor of the servants may be sustained. Supposing Joseph N. Stockett to have possessed them as a trespasser from the first to the last of the tedious law suit between him and Nicholas Watkins, the tort may be waived, and the action of assumpsit supported. This right to waive the direct injury, and adopt assumpsit, is universal, where the chattel taken has been turned into money. And it has been sustained in some instances, where the chattel has not been parted from by the trespasser. For the distinctions on this subject, *vid. Haubly vs. Trott, Cowp. 375*. The present case however differs in its facts from most of the cases decided on this head. The negroes have been restored to Nicholas Watkins, and the claim is for damages for the tort, committed by the trespasser in seizing them, and detaining them from the owner. That this kind of tort may also be waived, and an action substituted for it, on the implied contract, is fully established by the modern authorities, and is in fact in principle like the old cases reported on this doctrine. *Lightly vs. Coulston, 1 Taunt. 112*, and *Foster vs. Stewart, 3 Maul. & Selw. 197*, may be consulted, and they will be found decisive on the point. The last was the case of an apprentice seduced from the service of his master, where the seduction was waived, and an assumpsit for the work and labor of the apprentice, supported by *Ld. Ellenborough* and the whole Court.

With a few words on the second and third exceptions taken by the defendant, we will close this opinion. We cannot think with the Court below, that the admissions of Lurana Stockett, as to the terms on which she held the negroes that belonged to her husband's estate were competent evidence against the defendant. He avowedly possessed them * as administrator *de bonis non*, of John Stockett, and in fact was a trespasser on the rights of Nicholas Wat- **344** kins, and in neither character could he be prejudiced by the confessions of Lurana Stockett. It is true they were bequeathed by her husband to her, but if they had been proved her property, they nevertheless were subject to the testator's debts in his hands.

The third exception relates to the Act of Limitations, and we are of opinion that no part of the plaintiff's demand is barred by time,

if, in other respects, the action for it was sustainable. About the period of issuing out the writ, the defendant made acknowledgments to the witness, John Beard, that are amply sufficient to revive the remedy, and prevent the operation of the statute, on that portion of the account which had been standing for more than three years.

Judgment reversed, and procedendo awarded.

WILLIAMSON *vs.* ALLEN *et al.* use of RISTON.—June, 1830.

D. gave a note to W. for his accommodation, who endorsed it to S. for the full value. At the time S. advanced the money, R. was present and pledged his word to S. that if the note was not paid at maturity he would pay it. The note not being paid, S. brought suit against D.; pending the suit R. made S. several payments on account of the note, and at the last payment received from S. a receipt, concluding as follows: "which is in full of a note held by me against D. now in suit, and proceeds of the same properly belonging to said R." A few days before the trial of the cause and some months after the last payment, the suit was entered on the docket for the use of R. It appeared that R. was entitled to the beneficial interest in the note, and that S. had no other interest than what arose from an obligation to prosecute the suit to final judgment for R's use. *Held*, that as the payment to S. was not made by D. or on his behalf, that the suit could be carried on for R's benefit as the equitable assignee.

A promissory note may be purchased without taking an endorsement as well after, as before suit brought. The purchaser has the beneficial, and the vendor the legal interest; and the suit may be carried on without entering the use. (a)

345 * APPEAL from Baltimore County Court. This was an action of assumpsit, by the appellees, the endorsees, against the appellant, the drawer of a promissory note, for \$2,500, payable to Wilson, Williamson & Co. and by them endorsed to the plaintiffs. The action was commenced on the 23d of March, 1826. The defendant pleaded *non assumpsit*.

1. At the trial the plaintiffs offered in evidence the promissory note, on which the suit is brought, with the endorsement thereon, and which was admitted to have been executed by the parties whose names are on the same; to wit, "\$2,500. Baltimore, December 26th, 1825. Seventy days after date, I promise to pay Wilson, Williamson & Co. or order, twenty-five hundred dollars, and ——— cents for value received. D. Williamson." (Endorsed,) "Pay the contents to Messrs. S. & M. Allen & Co., Wilson, Williamson & Co.—S. & M. Allen & Co." The defendant then read in evidence to the jury the following bill on the equity side of this Court, and all the proceed-

(a) Cited in *Whiting vs. Ins. Co.* 15 Md. 315. Cf. *Gray vs. Wood*, 2 H. & J. 280; *Merryman vs. State*, 5 H. & J. 346.

ings thereon, with the answer of Sylvester L. Fowler, one of the plaintiffs, and the exhibits filed with the said answer. "To the Honorable the Judges of Baltimore County Court, sitting as a Court of Equity: Humbly, &c. your orator, David Williamson, of the City of Baltimore, says, that sometime in the month of December, 1825, a certain John B. Wilson, Charles A. Williamson and John N. Woodard, of the City of Baltimore, were trading under the firm of Wilson, Williamson & Co. and the said Charles A. W. being the son of your orator, and then being confined to his lodgings by indisposition, the said John B. W. applied to your orator for his aid, in raising funds for the use of the firm; falsely representing that the said firm was doing a good business, and only wanted funds to enable them to carry it on advantageously. And your orator further sheweth, that relying upon the said representations, your orator agreed to loan, and did loan to the said John B. W. for and on account of the said firm, his promissory *note in their favor, bearing date at Baltimore, the 26th of December, 1825, payable 70 days after date, for **346** the sum of \$2,500, for the purpose of raising money. And your orator further sheweth, that he has heard and believes it to be true, that the said John B. W. immediately thereafter, endorsed the said note in the name of the said firm, and transferred it to a certain George Riston, (he the said George R. knowing how the said note had been obtained,) at usurious interest; that the said George R. shortly thereafter, passed the said note to Solomon Allen, Moses Allen and Sylvester Fowler, of the City of Baltimore, (then trading under the firm of S. & M. Allen & Co.) but that the said George R. did not endorse the same, the endorsement of the said W. W. & Co. being, as your orator has been informed and believes, in blank. And your orator further sheweth, that the said note not being paid when it arrived at maturity, the said Solomon, Moses and Sylvester, instituted a suit thereon against your orator, which is now here depending, and to the proceedings wherein your orator begs leave to refer, and prays that the same may be taken and considered as a part of this, his bill. Your orator further sheweth, that he hath understood and believes that the said Solomon, Moses and Sylvester, are not in fact the holders of the said note, and have no interest therein; but that the said suit is intended for the benefit of the said George R. and is prosecuted for and on his account, by the said plaintiffs. And that the said Solomon, Moses and Sylvester, have no right of action whatever against your orator; all which actings and doings are contrary, &c. In tender consideration whereof, and forasmuch, &c. as he is unable to prove, &c. To the end therefore, that the said Solomon, Moses and Sylvester, may true answers make to the matters herein charged; and that in as full a manner as if, &c. and especially whether the said Solomon, Moses and Sylvester, did not receive the said note from the said George R. and if they did not receive the

347 said note from George R. from *whom did they receive the same? and on what account? and for whose use the same was received? and whether they paid value for the said note, and to whom and for whose use, and on whose account the said suit is carried on? and whether they, the said Solomon, Moses and Sylvester, have any and what interest in the said note? And that they may be required to produce the said note, and that the same may be cancelled and destroyed, and that your orator may have such other, and further relief, &c. Whereupon the said Sylvester Fowler filed in the County Court the following answer: The answer of Sylvester F. one of the defendants to the bill of complaint of David W. exhibited to the Judges of Baltimore County Court, sitting, &c. against Solomon A., Moses A. and Sylvester F. This defendant saying to himself, &c. says, that Solomon A. and Moses A. have no knowledge of the transaction to which the bill refers, as they were in Philadelphia at the time it took place, and have resided there ever since; the transaction was with this defendant alone, and he alone can testify respecting it. This defendant has no knowledge of the representations made by John B. W. to the complainant at the time the note was given, and cannot therefore either admit or deny the truth of the representations, as set forth in the bill. This defendant further states, that the firm of S. & M. Allen & Co. advanced out of their own funds, to W. W. & Co. the endorsers of the said note, the full amount of the note in money, without receiving or retaining interest, at the rate of more than six per cent. per annum; that the transaction was with the defendant, and so far as he has any knowledge of it, was not usurious, either in fact or intention, but was on the contrary perfectly fair and legal. This defendant further states, that the suit at law referred to in the bill was commenced against the maker and endorsers of the said note, by Solomon A., Moses A. and Sylvester F. on their own account, and for their own benefit. And lastly, this defendant again utterly denies the charge of usury, set forth in the bill of the complainant.

348 * Upon exceptions being filed to the preceding answer, the same respondent put in the following additional answer: To the first exception this defendant says, that to the best of his recollection, George R. was present with John B. W. when this defendant received the note, but the note was received from the said J. B. W. and not from the said George R. To the second exception this defendant says, that he received the note from the endorsers, W. W. & Co. as stated above. To the third exception this defendant says, that he received the said note on account and for the sole use of S. & M. Allen & Co. the plaintiffs in the action at law. To the fourth exception this defendant says, that he paid value for the note as stated in his original answer to W. W. & Co. the endorsers on the said note. To the fifth exception this defendant says, that at the time he advanced the money to W. W. & Co., George R. was

present, and pledged his word to the defendant, that if the said note was not paid at maturity, by the maker or endorser, he, the said George, would pay it. Since the suit at law was commenced, the said George R. has redeemed his pledge and paid the note, as appears by the following receipt herewith filed, marked A; upon this consideration the said George R. is now entitled to the beneficial interest in the said note and suit. This defendant further says, that if he had supposed it material, he should have stated this fact in his original answer. To the sixth exception this defendant says, that the plaintiffs in the action at law, have no other interest in the note, than what arises from an obligation to prosecute the suit to final judgment for the use and benefit of the said George R. To the seventh exception this defendant saith, that he herewith files the note and prays that it may be deemed as part of this, his answer.

The exhibit marked A, referred in the foregoing answer, is as follows, to wit: "We acknowledge the receipt from George Riston, of the following items, viz. on the 18th November, 1826, cash, \$586.57; on the 18th December, 1826, cash, \$517.16; on the 20th January, 1827, cash, * \$502.83; on the 19th February, 1827, cash, \$1,028.02; making in all \$2,634.58, which is in full of a note **349** held by us against D. Williamson, for \$2,500, which note is now in suit and the proceeds of the same properly belonging to said Riston. Baltimore, 19th February, 1827. S. & M. Allen & Co." And the defendant further gave in evidence by the notary public, by whom payment of the said note was demanded, at the instance of the legal plaintiffs, of the defendant, David Williamson, that when he applied to the defendant for the payment of the same, the said defendant refused to pay the same, alleging as a reason the following: "that the said note can or will not be paid, having been obtained by false representations, pretext, and devices, and not applied to the purposes for which it was given or intended to be used; and furthermore, because usury has been had and received thereon." And the defendant further gave in evidence that this suit was not entered for the use of George Riston, the person named in the said equity proceedings, until the 25th day of this present month, November, 1827, and after the coming in of the answers in the said equity proceedings mentioned. And further gave in evidence the following receipt, admitted to have been signed by Wilson, Williamson & Co. the payees on the promissory note aforesaid, at the time the note mentioned in the same was delivered by defendant to them.

"Baltimore, *December 26th*, 1825. Received of Mr. D. Williamson,
 one note dated 23d instant 60 days..... \$2,500
 26th " 70 " 2,500

Which we promise to pay at maturity. \$5,000
 \$5,000. WILSON, WILLIAMSON & Co."

And further gave in evidence, that one of the notes stated in said receipt is the note in suit in this cause. Whereupon the defendant, by his counsel, prayed the Court to instruct the jury as follows: First. That the plaintiffs are not entitled to recover upon the foregoing evidence if the jury believe the same; because it appears from such * evidence that said plaintiffs have been paid and satisfied the full amount of principal and interest due upon the promissory note, upon which the action is brought, and have no interest therein, and that said note is therefore extinguished. Second. That also upon said evidence, if the jury believe from the same, that the principal and interest of the note upon which the action is brought, and offered in evidence by plaintiffs, has been paid to the plaintiffs since the institution of the action; that then the plaintiffs are only entitled to recover nominal damages; both of which instructions the Court [ARCHER, C. J. and KELL, A. J.] refused to give, being of opinion that the defendant had adduced no evidence to shew, that any payment had been made to the plaintiffs by the defendant, or by his agent; but that the sum received by the plaintiffs from said Riston, must be considered as a consideration paid by him to the plaintiffs for an equitable assignment of the plaintiffs' legal interest in the cause of action.

The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Scott, for the appellant, cited *Smith vs. Pickering*, 6 *Esp. Rep.* 50; *Holland vs. Jourdine*, 1 *Holt*, 6; 3 *Serg. & Lov.* 5; The Act of 1763, ch. 23, sec. 7; *Brown vs. Davis*, 3 *Term Rep.* 83; *Baily on Bills*, 118, 454; *Brown vs. Turner*, 7 *Term Rep.* 630; *Tinson vs. Francis*, 1 *Camp.* 19; *Onion vs. Paul*, 1 *H. & J.* 114; *Norwood vs. Norwood*, 2 *H. & J.* 238; *Alstan vs. Contee*, 4 *H. & J.* 351; *Morgan vs. Reintzell*, 7 *Cranch*, 273; *Heighe vs. Farmers Bank*, 5 *H. & J.* 68; *Barger vs. Collings*, 7 *H. & J.* 213; *Owings vs. Owings*, 1 *H. & G.* 484; *Hollingsworth vs. Floyd*, 2 *H. & G.* 87; *McEvers vs. Mason*, 10 *Johns.* 224.

Meredith and J. Raymond, for the appellees, cited *Merryman vs. State*, 5 *H. & J.* 424; *Gray vs. Wood*, 2 *H. & J.* 328; *Mechanics' Bank vs. Hazard*, 13 *Johns.* 354; *Gray vs. Wood*, 2 *H. & J.* 328; *Ringgold vs. Tyson*, 3 *H. & J.* 178; *Hudson vs. Goodwin*, 5 *H. & J.* 115; *Day vs. Lyon*, 6 *H. & J.* 140; *Kiersted vs. Rogers*, 1 *b.* 285; 13 *Johns.* 354, 357; *Holland vs. Jourdine*, 3 *Serg. & Lovb.* 5, 6; *Brown vs. Davis*, 3 *Term*, 83; *Heighe vs. Farmers Bank*, 5 *H. & J.* 68; *Hollingsworth vs. Floyd*, 2 *H. & G.* 87.

Taney, (Attorney-General,) in reply.

353 * BUCHANAN, C. J. delivered the opinion of the Court. The promissory note on which the suit was brought, was drawn

by the appellant, David Williamson, in favor of Wilson, Williamson & Co. and by them endorsed to the appellees, S. & M. Allen & Co. The note appears to have been drawn for the accommodation of Wilson, Williamson & Co. and to enable them to raise money upon it. At the time of the endorsement by Wilson, Williamson & Co. the endorsees, S. & M. Allen & Co. the appellees, advanced to them the full amount of the note, which not being paid at maturity, they brought suit against the drawer, which was entered on the docket for the use of George Riston. When S. & M. Allen & Co. advanced the money on the note to Wilson, Williamson & Co., George Riston was present, and pledged his word to them, that if the note was not paid at maturity, by the maker, or endorsers, he would pay it; and did after the institution of the suit, pay to them the amount of the note. The entry on the docket, "for the use of George Riston," was made on the 25th of November, 1827, only three or four days before the trial. The amount so paid by Riston, was in different sums, and at different times, the receipt given to him for which, by S. & M. Allen & Co. is dated the 19th of February, 1827, when the last was paid, and concludes in these words, (after stating the different sums paid,) "which is in full of a note, held by us against D. Williamson, for \$2,500, which note is now in suit, and the proceeds of the same properly belonging to said Riston." And in an answer by Fowler, one of the firm of S. & M. Allen & Co. to a bill of discovery filed pending the suit at law, by David Williamson, it is alleged that in consideration of the payment by Riston, "he is now entitled to the beneficial interest in the note," and that S. & M. Allen & Co. have no other interest in the note, than what arises from an obligation to prosecute the suit to final judgment for his use and benefit. This answer and receipt, which is made an exhibit and referred to in the answer, were offered in evidence by David * Williamson, the appellant, and furnished the only evidence in the case relating 354 to the payment by Riston, and the interest he acquired in the note.

In this state of facts it is contended, that the note and the interest of S. & M. Allen & Co. the appellees, therein, were extinguished by the payment to them of the amount, and that he was not entitled to recover, or if entitled at all, that he was not entitled to recover more than nominal damages. Admitting that if the whole amount of the principal and interest of the note, was paid to the appellees by the appellant, or by Riston, for, and on his account, and as his agent after the bringing of the action, they were not entitled to recover more than nominal damages; yet there is nothing appearing in the record, that would have justified the Court, in instructing the jury either, that the appellees were not entitled to recover, or that they were only entitled to recover nominal damages, as was prayed at the trial, and is insisted on here; which would have been to assume the fact, that the payment was by the appellant, or by Riston, as his agent in discharge of the note. For if the payment was not

made by him, or his agent in discharge of the note, or with that intention, it does not necessarily follow, that it was thereby extinguished. Riston or any body else might have purchased it, without taking an endorsement by the appellees, as well after as before suit brought, which is not understood to be denied; and thus have acquired the beneficial interest, whilst the legal title remained in the appellees. And if Riston did purchase it, or advance the money upon it, not on account of, or as the agent of the appellants, and for the purpose of discharging it; but on his own account, and with the intention of acquiring the beneficial interest, and suffering the legal title to remain in the appellees, for the purpose of carrying on the suit, which he had a right to do, the note was not thereby extinguished, but remained in force, and no injury was done to appellant; who was not thereby deprived of any defence, that he would have had against the appellees, if no such * transaction had taken

355 place, and they had gone on to trial, as the legal and equitable holders. If Riston had purchased the note, or the beneficial interest therein; before the institution of the suit, but after it had reached maturity, without taking an endorsement, he could not have sued in his own name, but in the name only of the appellees, in whom the legal title remained for his use, subject to all the equities of the appellant, as against the appellees. And in this respect it makes no difference, when the purchase is made, whether before or after the bringing of the suit, the rights of the defendant being no more affected in the one case than the other. In the case of a purchase before suit brought, the entry for the use of the purchaser, if made at all, (which is not necessary for the purpose of carrying on the suit,) may as well be made at any time after, as at the time of bringing the suit, and it is as difficult to perceive why such purchase may not be made as well after, as before a suit is brought. For the principle here assumed, that the purchase of a promissory note, or the payment of the amount to the holder, not by the maker, nor on his account, nor with the intention to discharge it, but with a view of acquiring the beneficial interest in it, does not extinguish the note, whether made before, or after suit brought, but if made before and without endorsement, that suit may be brought in the name of him, in whom the legal title remains, for the use of him, who has thus acquired the beneficial interest, or if after suit brought, that the suit may be carried on in the name of the original plaintiff, for his use, and that the defendant can take no advantage of it, it is quite sufficient to refer only to *Gray and Biddle vs. Wood and Wife*, 2 H. & J. 328; *Mechanics Bank vs. Hazard*, 13 Johns. Rep. 353. And *Merryman vs. The State*, 5 H. & J. 423. The circumstance urged in the argument that Riston was present, when the note was endorsed to the appellees, and said if it was not paid at maturity, by the maker or endorsers, he would pay it, can have no influence upon the deci-

sion of this cause. That * pledge, if it can be so called, was made, for any thing appearing in the record, without consideration, and placed him under no obligation to pay it. The money then was not paid by the appellant; and if it was not paid by Riston on his account, or as his agent, nor with the intention to discharge the note, but with a view of acquiring the beneficial interest himself, and that the suit should be prosecuted for his use, there is no pretence that the appellees were not entitled to recover, or only entitled to recover nominal damages, though only nominal parties, and Riston the real party in interest to the suit. **356**

Is there then anything in the record to show, or from which a jury could infer, that it was paid by Riston, on the appellant's account, or as his agent, with a view to discharge the note, and not with the intention to acquire the beneficial interest himself? To say nothing of the evidence furnished by the answer of Fowler, one of the appellees, to the bill of discovery by the appellant, "that Riston, by paying the amount of the note, had entitled himself to the beneficial interest of it," and that the appellees "had no other interest in the note, than what arose from an obligation, to prosecute the suit to final judgment, for his use and benefit," the receipt of the appellees to Riston for the amount paid by him, which, with the answer of Fowler, is the only evidence in the cause, in relation to that subject, and that too produced by the appellant himself, speaks a language not to be misunderstood. It is this "in full of a note held by us against D. Williamson for \$2,500, which note is now in suit, and the proceeds of the same properly belonging to said Riston." The proceeds of the note could not have belonged to Riston, unless he had acquired the beneficial interest in it; and if he paid the money to the appellees, for and on account of the appellant, and with the intention to discharge the note, it would thereby have been extinguished, and he neither could nor intend to have acquired any beneficial interest in it. The proceeds then of the note, could only properly have belonged to Riston, as stated in the receipt, on the * ground that he paid the money, not for the appellant, or as his agent, but on **357** his own account, and thereby entitled himself to the beneficial interest in the note, with the right to pursue it in the name of the appellees.

Thus it appears from the appellant's own showing, that the payment of the money was not made by him, nor by his agent in his behalf. He therefore could not in any manner avail himself of it.

Judgment affirmed.

KALKMAN vs. CAUSTEN.—June, 1830.

K. whose vessel had been, with others, sunk in the harbor of B. in 1814, for its protection from the public enemy, in February, 1821, wrote to C. that "it would be a source of gratification to me, if your exertions are crowned with that success they so justly merit, and I rest assured, that you will interest yourself equally as much for the T's (the name of K's vessel) business, as that of the other vessels entrusted to your management." C. attended to the claim of the owners of the sunken vessels upon the Government for indemnity; and on the 5th March, 1823, K. enclosed him an order, (without date) on the Secretary of the Treasury, requesting him to pay C. out of the allowance for K's claim, which had been retained at the Treasury on K's account, a certain sum, being C's proportion of said retained money, as stipulated to be paid him for his services and expenses in collecting the proofs relating to the application of the said vessel to the public defence. It appeared that in 1817, K. had been discharged from his contracts under the insolvent laws of Maryland, and in December, 1821, his trustee agreed to allow C. a commission for prosecuting the claim of indemnity for K's vessel, in the event of his succeeding, provided the Court would permit the trustee so to do. The whole allowance was, however, retained by the Government, and passed to the credit of K's bonds, for duties then unpaid. In an action by C. against K. to recover compensation for his services aforesaid: *Held*, there was evidence for the jury to find a contract between C. and K. and they might as fairly infer that it was entered into a little anterior to the letter of 1821, as before the insolvency of 1817—and that if the plaintiff was to be paid out of the sum to be allowed on account of the vessels, yet if he had been deprived of it by the defendant's means, the defendant was personally liable—that the United States under the circumstances being authorized to retain the allowance in payment of the defendant's bonds, their claim being a just one, and the plaintiff having no lien on the fund in the Treasury, the defendant still remained liable.

358 * APPEAL from Baltimore County Court. Assumpsit by the appellee, James H. Causten, against Charles F. Kalkman, the appellant, commenced on the 2nd day of July, 1825.

The declaration contained counts for work and labor, goods, wares, and merchandise, the money counts, and an *insimul computassent*; and also two special counts, under which no evidence was offered by the plaintiff.

The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrerit*, &c. General replications and issues joined.

1. The plaintiff to support the issue on his part, offered evidence, that in the year 1814, a number of vessels were sunk at Fort McHenry, for the defence of the City of Baltimore; that among them was the ship *Temperance*, owned by the defendant, and to shew the amount of the allowance made by the United States in favor of the

defendant, he read in evidence the following letters and orders: "Baltimore, February 7th, 1821—Washington City, Jas. H. Causten, Esq. Dear Sir: I am very thankful for the information you had the goodness in communicating on the 3rd inst. (which only got to hand yesterday)—it will be a source of sincere gratification to me, if your exertions are crowned with that success which they so justly merit, and I rest assured that you will interest yourself equally as much for the Temperance's business, as that of the other vessels entrusted to your good management. When Mr. Williams comes thoroughly to know the situation of the ship owners, whose vessels were one of the principal causes of saving Baltimore, that gentleman, will, no doubt, throw no impediments in the way of recovering what is so justly and so long since due.

CHAS. FREDK. KALKMAN."

"The honorable William H. Crawford, Secretary of the Treasury—Sir: Please pay to Mr. James H. Causten, (out of the money retained at the Treasury for my account, say \$1,995.62, being the allowance awarded to me by the Secretary of the Navy, for the detention of my ship Temperance, under the Act of 26th April, 1822, 'An Act for the relief of sundry citizens of Baltimore') the sum of \$399.12; the same being his proportion of said retained money, as stipulated to be paid to him for his services and expenses in collecting the proofs relating to the application of said vessel to the public defence; representing the merits of the case before Congress, which obtained the passage of said law, and liquidating the ratio of compensation due to said vessel, under said law, before the Secretary of the Navy and the first Comptroller of the Treasury. With much respect, I am, sir, your most obedient servant,

CHAS. FREDK. KALKMAN."

"Baltimore, March 5th, 1823. Dear Sir: In conformity to your wish, I now enclose, (signed by me,) the letter for the Honorable the Secretary of the Treasury, also a letter addressed to Mr. John J. Thompson, on the Temperance's business. The papers in question, I have not been able to lay my hands on, but left such instructions at home, as will, in all likelihood, procure them. If in a little while hence, you will please call on Mrs. Kalkman, for that purpose, they may, with your friendly assistance, probably be found. Be assured, my dear sir, that you have my warmest wishes for your success, as to the irksome and intricate business still in suspense at Washington; not for my sake do I wish this, but on your own account, because the sacrifices which you have already made, and are still ready to make, richly entitle you thereto.

CHAS. FREDK. KALKMAN.

"Jas. H. Causten, Esq."

And further, the plaintiff gave in evidence that the said Causten had labored diligently, as agent of said owners of ships, and that the allowance awarded by the United States, was owing to the plaintiff's exertions in procuring testimony relative to said claim, &c. and further proved, the value of said services was equal to 20 per cent.

on the amount allowed by government. The defendant, to support the issue on his part, proved that the defendant, on the 18th of September, 1817, applied for the benefit of the Insolvent Laws of Maryland, and was under said laws duly released; that upon * his **360** said application, Elias Glenn was appointed trustee, for the benefit of said Kalkman's creditors, and he further offered to prove, that the said trustee entered into a contract with the said Causten, touching indemnification for said ship Temperance, which is as follows: "Baltimore, 12th December, 1821. Mr. James H. Causten. Sir: As you have undertaken to go to Washington this winter, to attend Congress on the subject of our petition before that honorable body, respecting the claim we have preferred, for unsatisfied damages and losses, sustained by our vessels sunk at the entrance of this harbor in the month of September, 1814, under the requisition of the commander-in-chief General Samuel Smith, whereby this important post, including Fort McHenry, was saved from destruction, by the impediment which they presented to the passage of the enemy's ships of war. We therefore hereby constitute you our agent for the above purpose, and request you will pay the necessary attention thereto; and in the event of your succeeding in obtaining the passage of a bill for our indemnity, we agree to allow you at the rate of twenty per cent. on whatever sum or sums we may receive, and which, through your agency and attention, may be authorized by law of Congress, to be paid to us respectively, whether it be by reference to the Secretary of the Navy or War, or other departments of the government. In the course of your stay at Washington, you will please to communicate occasionally with any one of us for the information of the whole, as well as for our government, in case we should deem it requisite to instruct you further on the subject.

HENRY PAYSON & Co.

Attorneys of Obed Mitchell, owner of ship Mars, &c."

"I agree, as trustee of Chas. F. Kalkman, to allow the above commission, provided the Court will permit me to do so. K. was the owner of ship Temperance. Elias Glenn, trustee of Kalkman, December 12th, 1821." "John Brice, trustee of J. H. Causten," and further proved that, upon Causten's application to said trustee, he referred him to Kalkman for information, and the correspondence on the * subject of indemnification for said ship Temperance, the **361** said trustee having no knowledge of the claim. The plaintiff further proved by Doctor McCulloh, Deputy Collector of the port of Baltimore, that by order of the government, the sum of \$1,995.62 was, after the said allowance to the owners of said vessel the Temperance, passed to the credit of said defendant, on certain custom house bonds given by said defendant, to the United States. Thereupon the defendant prayed of the Court the following directions to the jury:

First. That the plaintiff has adduced no evidence of any undertaking between him and the defendant, touching services for indemnification for the ship *Temperance*; by which the said Kalkman is liable to the said Causten, and that the plaintiff therefore is not entitled to recover.

Second. That if the jury shall believe, that the contract, if any existed between the plaintiff and defendant, was, that the plaintiff should receive his compensation, if any, out of the funds which should be awarded by the United States in favor of the ship *Temperance*, and that no part of said fund ever came to the hands, or was at the disposal of said defendant, or his trustee aforesaid, Elias Glenn, and that said Kalkman directed the secretary of the Treasury of the United States, to pay the said Causten the said compensation, by an order received by the said Causten, from said Kalkman, upon the said secretary, then the plaintiff is not entitled to recover.

Third. That if the jury shall find that the contract between Causten and Kalkman, (if any such shall be found by the jury to have been made) was made before said Kalkman's application for the benefit of the insolvent laws of Maryland; then the said Kalkman was by his release under the said laws, discharged from said contract, and the plaintiff is not entitled to recover, except subject to said release, and the provisions of said insolvent laws. Which directions, as prayed in the first and second prayers, the Court [ARCHER, C. J., HANSON, and KELL, A. J.] refused to give, but gave the direction prayed in the third prayer. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN and STEPHEN, JJ.

Mayer and *Frick*, for the appellant, referred to 3 *Wilson*, 207; 1 *Chitty on Bills*, 60, 63, 64; *Montgomery vs. Ivers*, 17 *Johns.* 38; *Wetter vs. Rucker*, 5 *Serg. & Low.* 160; 1 *Peters*, 193; *Ib.* 406, 439, 441, 442; *Ib.* 216; *Oliver vs. Gray*, 1 *H. & G.* 204; *Buller vs. Harrison*, *Cowp.* 565.

Hoffman, for the appellee, cited *Montgomery vs. Ivers*, 17 *Johns. Rep.* 38; *Chitty on Bills*, 121.

EARLE J. delivered the opinion of the Court. Our reflections on this case, have led us to the conclusion that the Court below were right, in refusing to give the directions prayed in the first and second prayers of the defendant, who is the appellant here. (The Judge here stated the facts of the case.) This being the testimony in behalf of the plaintiff, it is not easy to conceive how the Court could have given to the jury the directions asked in the first prayer—"that the plaintiff had adduced no evidence of any undertaking between him and the defendant, touching services for indemnifica-

tion for the ship *Temperance*, by which the said Kalkman is liable to the said Causten, and that the plaintiff is not therefore entitled to recover." The * evidence of the defendant's undertaking, **364** looked them full in the face, and his liability under it seems without doubt. The time of the contract between the parties, is not ascertained, and was a proper subject for the jury, who might as fairly infer, that it was entered into a little anterior to the letter of the 7th of February, 1821, as that it bore date before the insolvency in 1817. And if the meaning of the prayer is, that the defendant's undertaking is barred by time, as was suggested by the counsel, the answer is, that the services were not performed until some time in the year 1822, and in March, 1823, the order on the secretary acknowledges the justice of the plaintiff's demand, and that it was then a subsisting debt.

The Court's rejection of the instructions required in the second prayer, is also entitled to our decided approbation. If, under the contract, the plaintiff's compensation for services rendered was to be paid out of the sum allowed by the government, it does not necessarily follow that it cannot be recovered of the defendant. The personal remedy is unquestionable, if the plaintiff has been deprived of his compensation out of the funds, by the defendant's means, the fund here has not, in truth, come to his hand, nor is it now at the disposal of himself, or his trustee, but it has been snatched from the plaintiff, and wholly applied by the United States, to the payment of a debt due to them by the defendant, the justice of which he does not pretend to deny. The moment of appropriation by the United States is not known; neither is it worth inquiring into. The plaintiff had no lien upon the fund, arising out of the order, even if it had been presented before the money was applied to the payment of the custom house dues. It is not a bill of exchange, nor is the transaction within the pale of the law merchant, and there was no greater obligation on the United States, to pay in parcels, the sum awarded to Kalkman, than rests upon every private debtor, who has to pay a sum of money to a single individual creditor. If the United States **365** had answered the order, it would have justified the payment * to Causten, and this is the only valuable legal purpose it could have been made to answer. But it has been in argument contended, that the United States had no authority to apply this fund to the payment of the custom house demand, inasmuch as it had been previously disposed of by the insolvent laws of Maryland, and belonged to the trustee of Kalkman. If this be so, it affords a substantial reason why Kalkman's order should not have been paid to Causten by the Secretary of the Treasury. There is, however, nothing in the objection. Had this money been paid to the trustee, the United States would have been entitled to it, to satisfy the custom house bonds, the Act of Congress of 1799, ch. 128, giving them a priority of payment, in the disposition of insolvents' estates. 1 *Peters*,

438, 439, and the trustee would have had to perform the useless ceremony of receiving with one hand to pay with the other. Under what ever aspect this case can be considered, we think Baltimore County Court were correct, in refusing to instruct the jury, as prayed for by the defendant, and their judgment is affirmed.

Judgment affirmed.

STATE, use of MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*
vs. BOYD.—June, 1830.

The bond required from executors by the Act of 1798, ch. 101, sub-ch. 14, sec. 6, is a testamentary bond within the meaning of the Act of Limitations, of 1729, ch. 24, sec. 21, and an action upon such bond not commenced within 12 years after the passing the same, will be barred by pleading the Act of 1729, aforesaid. (a)

Any bond required by law to be given by an executor or administrator, by reason of the assumed representative character of executor or administrator, and to secure the payment of debts and legacies, or the faithful administration of assets, is a testamentary or administration bond, as the case may be.

Statutes are sometimes extended to cases not within the letter; and cases are sometimes excluded from the operation of statutes though within the letter; on the principle that what is within the intention of the maker of a statute, is * within the statute, though not within the letter, and that what is within the letter of the statute, and not within **366** the intent of the maker, is excluded, it being an acknowledged rule in their construction, that the intention of the maker ought to be regarded. (b)

APPEAL from Baltimore County Court. This was an action of debt, instituted by the appellants, on the 26th of March, 1825, against the appellee, James P. Boyd, as one of the sureties in the testamentary bond of Margaret M'Mechin and William M'Mechin, executors of David M'Mechin, bearing date July 21st, 1810. The following is the condition of the bond: "That if the above bound Margaret M'Mechin and William M'Mechin, executors of David M'Mechin, late of Baltimore County, deceased, shall pay all just debts of, and claims against the deceased, and all damages which shall be recovered against them, as executors, and also all legacies bequeathed by the will, then the above obligation shall be void; if otherwise to be in full force and virtue in law."

The defendant pleaded the Act of Limitations and several other pleas; but in virtue of an agreement by the counsel for the parties,

(a) See *Schell vs. State*, 8 H. & J. 419, note.

(b) Approved in *Baltimore vs. Root*, 8 Md. 105; *Scaggs vs. R. R. Co.* 10 Md. 276. Cited by MASON, J. in *Charles vs. Claggett*, 8 Md. 88. See *Canal Co. vs. R. R. Co.* 4 G. & J. 1.

a *pro forma* judgment was entered in the County Court for the defendant, and an appeal taken by the plaintiff to the Court of Appeals, "where the only questions to be decided, are, whether any of the Acts of Limitation be a bar to the plaintiff's claim, and whether the length of time, from the date of the bond, be not presumptive evidence of payment." Under this agreement, judgment in the County Court was accordingly entered for the defendant, and an appeal taken by the plaintiff, to the Court of Appeals.

The case came on to be argued before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

Hoffman and Mayer, for the appellant, cited Acts of 1715, ch. 23, sec. 6; 1729, ch. 24, sec. 21; 1798, ch. 101, sub-ch. 14, sec. 6; *Val. Dep. Com.* 179; *Toll. Ex'rs*, 96, 496; 6 *Bac. Abr.* 383; *Ib.* 391; *Salisbury vs. Black*, 6 *H. & J.* 293; *Montgomery vs. Hernandez*, 12 *Wheat.* 129; Act of 1802, ch. 101, sec. 9; *Braxton vs. Winslow, Wash. Va. Rep.* 31; *Com. Dig. (Covenant) Letter E*, 2 *Saund.* 177; *Ward vs. Reeder*, 2 *H. & McH.* 152; *Kelly vs. Greenfield, Ib.* 138; *State vs. Rogers and Wife*, 198; *State vs. Stump and Gilpin, Ib.* 174; *Murray vs. Ridley*, 3 *Ib.* 175; *Davidson vs. Clayland*, 1 *H. & J.* 548; *Hall vs. Gittings*, 2 *H. & J.* 112; *Howard vs. Moale, Ib.* 260; *Patterson vs. Md. Ins. Co.* 3 *Ib.* 71; 3 *Stark. Ev.* 1089.

Meredith, for the appellee, cited 6 *Bac. Abrid.* 384; 1 *Kent's Com.* 423; *McLuny vs. Silliman*, 3 *Peters*, 278; * *Fowler vs. Padget*, 371 7 *Term Rep.* 509; He cited also *Schell vs. State*, 3 *H. & J.* 538; *State vs. Wright*, 4 *Ib.* 148; and the Act of 1729, ch. 24, sec. 15; *Salisbury vs. Black*, 6 *H. & J.* 293; *Angel on Lim.* 181; *Angel on Lim.* 162; *Adams vs. Woods*, 2 *Cranch*, 336.

BUCHANAN, C. J. delivered the opinion of the Court. The bond upon which this suit was brought, was given to the State by Margaret M'Mechin, who was executrix, and William M'Mechin, who was executor of David M'Mechin, with D. Carroll and James P. Boyd, as sureties, in pursuance of the Act of 1798, ch. 101, sub-ch. 14, sec. 6, which provides, that "no executor shall be obliged to exhibit any inventory, or account, provided he will give bond, instead of the bond herein before directed, with such security, and in such penalty, as the Court shall approve to the State of Maryland, to be recorded and sued, as before directed, with condition for paying all just debts of, and claims against the deceased, and all damages which shall be recovered against him as executor, and also all legacies bequeathed by the will," which are the words of the condition of this bond.

The defendant pleaded five pleas, upon some of which there were issues joined, and demurrers to the rest; whereupon at the trial, a judgment *pro forma* was rendered for the defendant, upon an agreement filed in the cause, by which the only questions presented to

this Court on the appeal * are, whether either of the Acts of Limitations of this State, which were pleaded, be a bar to the appellant's claim, and whether the length of time from the date of bond, be not presumptive evidence of payment. The latter point being abandoned by the counsel for the defendant, our enquiry is restricted to the questions arising upon the pleas of the Acts of Limitations. **372**

The Act of 1729, ch. 24, sec. 21, provides, "that all actions upon administration and testamentary bonds, shall be commenced within twelve years after the passing the said bonds, and not after." This bond bears date the 21st of July, 1810, and the original writ was impetrated on the 26th of March, 1825, almost fifteen years after the date of the bond; and if it is to be considered as a testamentary bond, within the operation of that Act, the right of the appellant to recover is thereby barred. Is it then such a bond? The condition is not, indeed, in the form of the ordinary testamentary bond, nor of that which was in use, when the Act of 1729 was passed; and such a bond given by one not connected with the administration of assets, but a mere stranger, would not be deemed a testamentary or administration bond. But any bond that is required by law to be given by an executor or administrator, by reason of the assumed representative character of executor or administrator, and to secure the payment of debts and legacies, or the faithful administration of assets, is a testamentary or administration bond, as the case may be. The bond in question was given in pursuance, and under the authority of an Act of the Legislature, by an executrix and executor named in the will, to secure the payment of all just debts of, and claims against the deceased, and also all legacies bequeathed by the will, and all damages recovered against them, as executors, and does not destroy the representative character any more than the ordinary testamentary bond. On the contrary, the same section of the Act, entitled, "An Act for amending and reducing into system, the laws and regulations concerning last wills and testaments, the duties of executors, * administrators and guardians, and the rights of orphans and other representatives of deceased persons," commonly called **373** the testamentary system, which provides for the giving of such a bond by an executor, also provides, "that in case such a bond be given by an executor, he shall be answerable for all debts, claims and damages, recovered against him as executor; and if suit be brought against him as executor, that the judgment shall be for the whole sum found by the jury, or otherwise ascertained, and execution may issue and have effect, as if he were sued in his own right." Thus clearly shewing the continuance of the representative capacity, in which he may be sued, just as when the ordinary testamentary bond is given. With this difference only, that on giving such a bond, in lieu of the ordinary testamentary bond, he is discharged from the obligation to exhibit any inventory, or account, and is rendered answerable for all

the debts, legacies, &c. with or without assets, coming to his hands. Whereas, in the case of the ordinary testamentary bond being given, he is subjected only to a qualified liability. And why should a bond by an executor, which (whether assets sufficient come to his hand or not,) subjects him to the absolute payment of all the debts and legacies, be deemed less a testamentary bond, than one which subjects him to an eventual liability only; when, in neither case does he lose his representative character; but may equally in each, sue, and be sued, as executor. By the 10th section of the 3d sub ch. of the same Act, it is provided, "that any bond executed by an executor or executrix, administrator or administratrix, as hereafter mentioned, shall be recorded in the office of the Register of Wills, where administration is granted;" and "that any person conceiving himself, or herself, interested in the administration of said estate, shall be entitled to a copy, upon which an action may be maintained, &c." The words "any bond executed by an executor," and "as hereafter mentioned," thus pointing as well to the bond provided for by the subsequent section, under which this bond was given, as to the ordinary bond by an *executor, and making no distinction between

374 them, but placing them on the same footing, by making them equally liable to be put in suit, by any person interested in the administration of the estate. The section under which this bond was given, is a branch of the testamentary system providing for a particular mode of administering the estates of deceased persons; and the bond required to be given by an executor (and without which, letters testamentary cannot be granted,) like the ordinary bond of an executor, is for the protection and security of the rights of those interested in the administration of the assets. They are given under the same system, with the same object, by persons acting in the same capacity, and equally under the directions of the will of the testator, and are, we think, equally testamentary bonds. Suppose the testamentary system had provided for no other bond to be given by an executor, could there then have been a doubt whether it was or not a testamentary bond, and can it be considered as having a different character imparted to it, by the mere circumstance, that there is another bond provided for, suited to a different state of things, or to the mere ordinary mode of administration. But it is strongly urged that assuming this to be a testamentary bond, it is not within the operation of the Act of 1729, which is supposed to contemplate only the testamentary bond then in use in this State, and not to embrace testamentary bonds of any other description. However ingeniously pressed, it is the opinion of this Court that the position contended for cannot be sustained. Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter; on the principle that what is within the intention of the makers of a statute, is within the statute, though not within the

letter; and that what is within the letter of a statute, but not within the intention of the makers, is not within the statute, it being an acknowledged rule in the construction of statutes, that the intention of the makers ought to be regarded. Viewing the bond in question as a * testamentary bond, it is within the letter of the Statute of 1729, which speaks in terms of "all actions upon administration and testamentary bonds." Suppose then, the legislators who passed that law, were now convened, and asked whether they intended that it should operate only upon the administration and testamentary bonds then in use, or that it should extend to any administration or testamentary bonds within the mischief intended to be provided for, that might at any time be required, or authorized by law, to be given? Can it be doubted what the answer would be, looking to the object of the Legislature, which was the general repose and quiet of society, by protecting men from the vexatious prosecution of stale claims, supposed by length of time to have been paid, but the evidences lost. Not a reason is to be assigned why there should be a limitation of time to the bringing of suits, on the ordinary testamentary bonds, that does not apply with equal force to this. It is true, that such a bond as this was not at that time known, nor in common use, but the Legislature had a right to create it, and it is equally true, that it is within the mischief intended to be remedied, that is the bringing of suits on testamentary and administration bonds, after a lapse of twelve years from their date, and also within the spirit of the Act. And being within the spirit and reason and letter of the Act, and also within the mischief intended to be remedied, there is no rule of construction which excludes it from the operation of the Act. **375**

This view of the character of the bond, and of the operation upon it of the Act of 1729, renders it unnecessary to enquire whether, if this was not a testamentary bond, the claim of the appellant would be barred by the Act of 1715.

Judgment affirmed.

* THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* ANN CHASE *et al.*—June, 1830. **376**

C. filed a bill in Chancery to recover dower in certain real property, upon which that Court appointed a receiver to receive the rents and profits pending the controversy. After this, The Mayor and City Council of Baltimore filed their petition against the receiver, praying to be paid for taxes due on said property prior to the time of the receiver's appointment, out of the rents which had come to his hands. The petition did not aver that there was no personal property of the tenant in possession to be found sufficient to pay the taxes charged, nor was the tenant in possession at the time the taxes became due, who by law, is chargeable with their payment, made a party. *Held*, that they could not recover.

It is a well settled principle, that the Court of Chancery will not order a receiver to pay over, or account for the rents and profits to a party, when the land is not charged with the payment of his claim.

In the collection of taxes imposed upon real estate within the City of Baltimore, for the year 1821, the ordinances of that city imposing them, having referred to the laws of the State, for the manner of collecting them, the land can never be sold for their payment, unless the collector can find no personal property liable for the payment of the tax. If personal property can be found, it must be made liable in the first instance.

APPEAL from the Court of Chancery. This petition, which was filed on the 27th October, 1826, by the appellants, stated, that certain taxes due to them for the year 1821, upon certain real estate in the City of Baltimore (and which was then in the hands of a receiver, appointed by the Court of Chancery, in the case of Hannah K. Chase, against the appellees,) amounted to the sum of \$156. That said taxes were duly imposed by ordinances, passed in virtue of the Act of incorporation of the Mayor and City Council of Baltimore and the several supplements thereto. They therefore prayed that the said receiver, out of the rents and profits of said estate, be authorized and directed by an order of the Court, to pay the said sum of money, with interest thereon, from the 1st day of January, 1822.

On this petition, BLAND, Chancellor, passed the following order, March 23, 1827: On the foregoing application, it is ordered that the receiver in the said case, pay out of the first money received by him, as receiver, the sum claimed by this *petition, unless
377 cause to the contrary be shewn by the parties to the said cause, before the 16th day of May next: Provided a copy of this order, and the foregoing petition, be served on the said parties, or their solicitors, before the 16th of April next.

The defendants, Ann Chase, Matilda Ridgely and Samuel Chase, to this petition, pleaded *non assumpsit*, and the Act of Limitations, and by their answer denied that the appellants have any just or equitable claim, or lien, or charge whatever on the premises in the proceedings mentioned, which can be decided in a Court of Chancery; and they insisted, that if the appellants have any claim at all against them, it is a legal claim, and properly examinable in a Court of law.

The petitioners filed their account for the said taxes, with the affidavit of the collector of the city tax annexed, that the bill for the same was duly delivered, and that no part thereof has been paid, or satisfied, but that the whole is still due and owing to the said petitioners; and also a copy of the assessment of the property, and of the ordinances imposing the taxes and tax bill, all under the corporate seal.

BLAND, Chancellor, (June 28th, 1827.) After hearing the parties by their solicitors, and considering the petition, plea or answer thereto, and proceedings, I am of opinion that the case set forth by the petition is not one of such an equitable character as falls within the cognizance of this Court. Whereupon it is ordered, that said petition be dismissed with costs.

From this order the petitioners appealed to the Court of Appeals.

This case was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Scott, for the appellant, referred to the Acts of 1796, ch. 68; 1817, ch. 148; 1817, ch. 195; 1818, ch. 122; The Ordinances of the Mayor and City Council of 1821, ch. 20; 1821, ch. 37; The Act of 1825, ch. 184; 1 *Cov. Pow. on Mortg.* 294, (note) 299, (a) 299, (b) 302, (a;) The Act of 1817, ch. 148, sec. 4.

A. C. Magruder, for the appellees.

STEPHEN, J. delivered the opinion of the Court. The object of the petition filed in this case, was to recover certain taxes due to the corporation of the City of Baltimore for the year 1821. Some time prior to the filing * of the petition in this case, a bill was filed in the High Court of Chancery by Hannah Kitty Chase, against these **379** defendants, and others, for the purpose of recovering her right of dower in the property upon which the tax was imposed. In that case the Chancellor thought fit to appoint a receiver, to receive the rents and profits pending the controversy between the parties. This receiver was appointed in the year 1826, long subsequent to the time when the taxes became due. The petition prayed the Chancellor to pass an order authorizing and directing the receiver to pay the said taxes, amounting to the sum of \$156, with interest thereon from 1st January, 1822. On this petition the Chancellor passed the order, and the proceedings before set forth took place.

In the first place it will be remarked that it is not averred by the petition that there was not personal property upon the premises sufficient to pay the taxes charged, nor is the tenant in possession at the time the taxes became due, made a party to the proceedings. By the Act of 1796, ch. 68, to erect Baltimore Town into a city, the corporation are vested with power to lay and to collect taxes, and to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the City of Baltimore. This power and jurisdiction to lay taxes, was, by the Act of 1796, subject to a limitation, as therein prescribed; which restriction, however, is removed by the Act of 1817, ch. 148, sec. 4, by which it is enacted "that the Mayor and City Council of Baltimore shall have power to lay and collect direct taxes, on the assessment of private property within the city, to such an amount as shall be thought necessary for the public or city purposes; and may enforce the collection of all

dues and impositions, except fines, penalties and forfeitures, in the same manner as is now provided with respect to city taxes; and tenants in possession shall be liable to the payment of taxes imposed upon premises occupied by them, without its operating however to alter the nature of contracts between landlords and tenants."

380 * Under these delegated powers, the taxes in question were imposed by ordinances passed in 1821, chs. 20 and 37. Sec. 3 of ch. 20 provides that the taxes imposed by that law shall be collected and paid in the manner prescribed by the laws of the State, or ordinances of this corporation; and sec. 1 of ch. 37, provides that the said direct tax shall be paid and collected in the manner prescribed by Acts of Assembly, or ordinances of the city. By the 10th sec. of the Act of incorporation, it is enacted "that the person or persons appointed to collect any tax, imposed in virtue of the powers granted by this Act, shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith; but no sale shall be made, unless ten days previous notice thereof be given; and if the tax imposed shall be chargeable on any real property, and no goods or chattels can be found, liable to be distressed therefor, the same may be recovered by action of debt, or attachment in Baltimore County Court, in which no imparlance shall be allowed." By the provisions of this section, it is clear that no power is given to sell the land, but the collector is to recover the tax by distress of the goods and chattels of the person chargeable with the tax, who, we have seen by the Act of 1817, before referred to, is the tenant in possession of the property upon which the tax is imposed. The several ordinances imposing the taxes in question, having referred to the laws of the State for the manner of collecting them, it becomes necessary to advert to the several Acts of Assembly upon that subject. By the Act of 1794, ch. 53, sec. 1, the Levy Courts are directed to appoint a collector for the several counties, to collect the county charges; and the 7th sec. provides, "that if any collector shall proceed to the sale of any goods or chattels, to enforce the payment of the county charge, he shall be entitled to receive the same fees as are, or shall be established by law, on the service of executions." The Act of 1797, ch. 90, provides "that where any lands may become charged for the payment of county taxes, and * the collector of the

381 county can find no personal property in said county liable for, or chargeable with, the payment of the same, the land, in the manner therein specified, may be sold, by order of the commissioners of the tax, to the highest bidder, to discharge the taxes thereon due." By the provisions of this Act of Assembly, it appears that the land can never be sold for the payment of taxes for which it is charged, unless the collector can find no personal property liable for the payment of the tax. If personal property can be found, it must be made liable in the first instance. As therefore, the petition in the case does not allege that there was no personal property which could be

made liable, it follows necessarily that no ground was furnished by it, for the interposition of a Court of equity; and the Chancellor was clearly right in refusing the application to compel his officer to pay the same out of the rents and profits received by him. It is also clear, upon established principles, that the tenant in possession, who by law is chargeable with the payment of the tax, ought to have been made a party, for the purpose of ascertaining whether or not the tax had been paid; on the same ground as has been decided by this Court, that the executor or administrator must be made a party where a Court of Chancery is resorted to for a sale of the real property, for payment of debts, where the personal fund is charged to be insufficient for that purpose. *Tyler et al. vs. Bowie's Adm'rs*, 4 H. & J. 333. It is also a well settled principle, that the Court of Chancery will not order a receiver to pay over, or account for the rents and profits to a party, where the land is not charged with the payment of his claim. As where there was a mortgage for one hundred years, to raise portions for daughters. After the expiration of the mortgage term, the Court would not compel the receiver to account for the rents and profits received during the term, after it had expired, the land being then discharged. To entitle themselves to be paid in this case by the receiver, * it was necessary to shew 382 by their petition, that they had a right to proceed against the land to satisfy their demand. *Gusley vs. Adderley*, 1 Swanst. Rep. 573. Decree affirmed.

JOHN DAVIS *et al.* vs. JOHN H. BARNEY.—June, 1830.

The plaintiff and defendant being joint owners of a line of stages, agreed as follows: "I (the defendant) hereby acknowledge to have received of D. (the plaintiff) stage proprietor on the W. and B. road, \$9,000, as a full compensation for the within named four teams, and two coaches; and I bind myself to withdraw all my pretensions to any part of said road; and I herewith deliver to the said D. the teams as they are at this instant, on the road between this place, (B.) and W.; and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to him." *Held*, that in construing this contract, the Court must endeavor to arrive at the meaning of the parties, by looking to the motives that led to it, and the object intended to be effected by it. The motive was to become sole proprietor of all the stages on that road, and to shut out all opposition. To effect that object, the purchase of the defendant's interest in the stages was made.

The intention of the contract was that the defendant should, in good faith, not only not become interested in any opposition, but that he would not in any manner aid or become instrumental in the setting up, or carrying on an opposition line.

The word "indirect" was used for the special purpose of guarding against any kind of interference by the defendant, in aiding, or in any manner promoting the establishment of, or carrying on, any opposition. (a)

(a) Approved in *Guerand vs. Dandeleit*, 82 Md. 570.

A line of stages being established in opposition to the plaintiff's line, the Court held, that if the defendant furnished its owners with money, credit, or other means, for the purpose of enabling them to carry it on, and that the means so furnished, did enable them to establish and carry it on, and that they could not have established or carried it on without such means, or that the defendant did furnish them with money, credit, horses, or any other means, for the purpose of enabling them the better to establish or carry it on, and that such means did so enable them, then the plaintiff was entitled to recover damages for a breach of the said contract.

Where there is any legal admissible evidence, tending to prove the issue in a cause, the effect of that evidence is solely for the consideration of the jury. (b)

When there is no evidence applicable to the issue, or tending to prove any material fact, there is a total failure of evidence, the Court will direct the jury accordingly.

383 * APPEAL from Baltimore County Court. This was an action upon the case, brought upon the 26th of January, 1826, by the appellants, John Davis and others, constituting the firm of David Barnum & Co. against John H. Barney, the appellee. The declaration contained three counts.

The first averred that whereas the said defendant, before and at the time of making the agreement and undertaking hereinafter next mentioned, was the owner and proprietor of certain teams and coaches, for the carriage and conveyance of passengers from Baltimore City, in the county aforesaid, to Washington and Georgetown, in the District of Columbia, and also from Washington and Georgetown aforesaid, to the said City of Baltimore; and being owner and proprietor, as aforesaid, the said defendant, on the 30th September, 1825, at, &c. in consideration that the said plaintiffs had paid to him the sum of \$9,000, as a full compensation for his four teams, (say sixteen horses) and two coaches, then running on the road between Baltimore City and Washington aforesaid, did promise and undertake, to withdraw all his pretensions to any part of the said road, and not to be concerned, direct or indirect, in any line of stages in opposition to those then owned and employed by the said plaintiffs; yet the said defendant, not regarding his said promise and undertaking, but intending to deceive and defraud the said plaintiffs in this behalf, did, afterwards, to wit, on, &c. at, &c. become sole owner of a line of stages, which were for a long space of time, to wit, &c. used and employed by the said defendant, on the said road, between the said City of B. and W. and G. to wit, &c. in the carriage and conveyance of passengers, in opposition to the line of stages then and there owned by the said plaintiffs, and employed and used by them on the said road as aforesaid.

(b) Approved in *Goodhand vs. Benton*, 6 G. & J. 488; *Wetherall vs. Mickle*, 28 Md. 464. Examined in *Cole vs. Hebb*, 7 G. & J. 27. See *Davis vs. Davis*, 7 H. & J. 28, note.

2d Count.—And whereas also, heretofore, to wit, &c. at, &c. in consideration that the said plaintiffs had paid to the said defendant, the sum of \$9,000, as a full compensation for his four teams, (say sixteen horses) and two coaches, then * running on the W. and B. road, he, the said defendant, did then and there promise and undertake, to withdraw all his pretension to any part of the said road, and not to be concerned, direct or indirect, in any line of stages in opposition to them, the said plaintiffs. Yet the said defendant, not regarding his said last mentioned promise and undertaking, but contriving, &c. did afterwards, to wit, on, &c. at, &c. become part owner of a line of stages, which were, for a long space of time, to wit, &c. used and employed by the said defendant, on the said road, in the carriage and conveyance of passengers, in opposition to the line of stages owned by the plaintiffs and employed and used by them, on the said road. **384**

3d Count.—And whereas also, heretofore, to wit, on, &c. at, &c. in consideration that the said plaintiffs had paid to the said defendants, the sum of \$9,000, the said defendant then and there promised and undertook to withdraw all his pretensions to any part of the said road, and to deliver to the said plaintiffs four teams and two coaches, as they then were upon the said road from B. to W., and did further promise and undertake, not to be concerned, direct or indirect, in any line of stages in opposition to the said plaintiffs. Yet the said defendants, not regarding, &c. but contriving, &c. did afterwards, to wit, on, &c. at, &c. become concerned, indirectly, in establishing and carrying on a line of stages, which were for a long space of time, to wit, &c. used and employed on the said road, in the carriage and transportation of passengers, in opposition to the line of stages owned by the said plaintiffs, and employed and used by them on the said road as aforesaid, during the time of such opposition as aforesaid, to the damage, &c.

The defendant pleaded *non assumpsit*, and issue was joined.

1st Exception.—At the trial of this case, the plaintiffs, to support the issue on their part; proved that they and the said defendant, being joint owners of a line of stages on the Washington and Baltimore road, after various negotiations, entered into the following contract.

* "Dear Sir,—In answer to your request, I hereby agree to take for my four teams, (say sixteen horses) and two coaches, now running on the Washington road, \$9,000, and will withdraw all pretensions whatever of my interest on the said road—the payments must be cash, or such paper that will command cash. On this being complied with, I will give, from under my hand, not to have any interest in the staging on the said road. I still hold one-sixth of a share in the Steamboat Company, on the Potomac River, as a set against any claim that has or may hereafter come against me as a proprietor **385**

of the said Company. This must be taken as my *ultimatum*. I am,
 dear sir, your obedient servant,

JOHN H. BARNEY.

David Barnum, Esq."

"Baltimore, 30th September, 1825. I hereby acknowledge to have received of Messrs. David Barnum & Co. stage proprietors on the Washington and Baltimore road, \$9,000, as a full compensation for the within named four teams and two coaches; and I bind myself to withdraw all my pretensions to any part of the said road, and I herewith deliver to the said company, the teams as they are at this instant, on the road between this place and Washington, and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to them.

JOHN H. BARNEY."

And the plaintiffs further offered in evidence, that after such contract was entered into, and before the institution of this suit, that is to say, on the 30th of October, 1825, a line of stages, in opposition to that of the plaintiffs, was set up, and was carried on until the 1st of September, 1827, upon the said road; and that the stages and horses used on said road, stabled at, and started from the stables of the defendant, and that the drivers of such opposition line of stages, boarded at the house of the defendant, and that every thing was carried on precisely in the same manner, after such opposition line was established and carried on, as before the sale and contract before

386 referred to, in this exception, except that Mr. * Thompson had the management instead of B. He also proved that three stages belonging to the defendant, when witness drove for Mr. B., previous to said contract; four horses and three sets of gears also belonging to the defendant, when witness drove for him previous to said contract, were used upon this opposition line; and also proved that B. the defendant, at the time one of the witnesses came to drive on this opposition line, was indebted to said witness, and told said Stephen J. Thompson, to pay said witness, provided he came and drove for him, Thompson—and also proved that B. said to a witness when speaking of this line we want drivers—that such words induced witness to ask defendant if he was concerned, to which he replied no—they also proved that B. neither kept a boarding house nor livery stables—and that before the contract before mentioned, the defendant, B. ran a team of horses on the Philadelphia road, from Baltimore, in a line of stages on that road, and that he retained his interest in said Philadelphia road, till the fall of 1826, when it was placed in the name of Stephen J. T.; and also proved that the same horses which run on the Washington and Baltimore road, in the line of stages in opposition to said plaintiff, were used to run on the Philadelphia road, and in that part of the line belonging to B. which was the first ten miles from Baltimore; and that the said Stephen J. T., was the son-in-law of B. and resided during all this time aforesaid, and for many years before, with said B., and that in the year 1822, the said Stephen J. T., applied for the benefit of the

insolvent laws, and in March Term, 1823, obtained his final release; since when, until this opposition line was started, he was not engaged in any kind of business, nor has he since been engaged in any other business than as the agent of this line, and as agent for his brother; and the plaintiffs further gave in evidence that the stables which were so rented by the defendant, to the said Thompson, for the use of the said opposition line, were situated in the rear of the defendant's * dwelling house, and that the stages of the said line daily passed his door, and that the defendant went to the stage office three or four times in two years, and when there, enquired of the agent of Thompson how they were coming on; and that the stages and horses sold and delivered by the defendant to the plaintiff, independent of their part of the line, were worth not more than \$2,000; and that whilst the defendant was the avowed owner of the line of stages, he did not come to see the horses once in nine or ten months, trusting to the drivers. The plaintiffs also offered in evidence that John V. Thompson, the brother of Stephen J. T., above mentioned, is, and has been for many years, a resident of the City of Baltimore, and that he followed the trade of a journeyman sadler for several years, but quitted it about seven years ago, because he was short-sighted; the witness said he had no means of knowing the situation of said Thompson; that he never had occasion to enquire into his circumstances, and he might have had money without witness knowing anything about it; witness never considered John V. Thompson as a man who would be in credit for a large sum of money; he might have had thousands without his knowing it. Whereupon the defendant, to support the issue on his part, offered in evidence to the jury, by Stephen J. T., that he, the witness, was present when sale was completed, as mentioned in the said contract; that defendant observed that he had not received as much as his property was worth; that if they, the plaintiffs, would permit him still to hold an interest for the residue of the mail contract, which had two years and three months to run, and discharge him from his contract, he would return the money received, which was then in his, defendant's hand, and give them up their note for the balance, and \$1,000. He then offered to sell to the said plaintiffs, the remainder of his property, consisting of stages, horses and gears. He also offered to rent to the plaintiffs, his stables, one of whom expressed his regret that the stables were not situated nearer him, all of which they * refused. Witness commenced to run a line of stages from Baltimore to Washington about the 30th October, 1825, and purchased of defendant the stages, horses and gears, so offered by him to the plaintiffs, and refused to be taken by them; and also, after sale to the plaintiffs by the defendant, he, Thompson, purchased out his, defendant's, team on the Philadelphia route, with his interest in the contract on that route upon the last mentioned purchase. Defendant and witness went to McDonald, to whom defendant

stated that he had sold out on the Philadelphia road to witness, who in future would hold the interest in the said line called the Union line, McDonald being one of the owners of said line. Witness stated that his brother John had enabled him to purchase out the defendant in the first instance, and establish his line of stages to Washington; and that his brother William was subsequently interested, and furnished the means—he appeared as agent. That the present defendant never was interested therein, either in establishing said line, or continuing it, and had no concern with the line after witness bought out the defendant; he had two horses remaining, which he kept for his own use through the summer. Witness applied to him to let him have them during the winter; this application, was in the fall, and witness agreed to winter them without any charge for their keeping, as defendant had no use for them in the winter; nothing was said of the kind of use witness should apply them to. Witness had, at the time, a small carryall and a gig; and drove them sometimes in one, and sometimes in the other; also, in the course of the winter, drove them in the stage on the Washington road; this without any express consent of the defendant, who, witness presumes, knew they were so driven, but does not know whether or not—does not know how long driven in the stage, or when first put in; they might have been driven one-third, or one-half the time in the stage; the horses and stages which witness had on the two routes, cost at different times, a little less than \$5,000. John V. Thompson,

389

son, was * the sole owner until some time about August, 1826, then sold out to William D. Thompson. John V. Thompson was at the office every day whilst interested; his health did not permit him to do much, but the business was considered under his eye; books kept in witness' name as agent; never received one dollar of defendant; he did not pay defendant for stages and horses purchased; the price was agreed on, and was to be paid when convenient to the witness, he paying interest therefor; the amount not yet paid. Witness considered himself, as agent, and his brother also, responsible to defendant for the property so purchased as before mentioned, and for which he had agreed to give \$1,050; but he did not consider himself as individually responsible; the amount to be paid when convenient, but to bear interest; which interest was, at different periods, paid to defendant, as well as rent and board; believes interest to have been rather overpaid; no note was given for the amount of purchase; begun to pay to defendant on account of interest, &c., within six months after contract. Witness had sometimes had two or three, sometimes five or six drivers and porters boarding with the defendant; the defendant sold out the Annapolis line to Mitchell, shortly after his contract with the plaintiffs; when defendant owned stages, one seldom went out without his examining it particularly; since he sold out, have not seen him three times in the stable yard; never once saw him in the stable. Witness, before contract between

defendant and plaintiff, told Smith, one of the company, and one of the plaintiffs, whose death is suggested, that he, witness, meant to establish a line of stages between Washington and Baltimore; that he repeated the same thing to Smith, on different occasions, and told him if plaintiffs completed their contract with defendant, he would not prevent his going on. Upon being asked whether he informed plaintiffs at the time of contract, says he did not at that time; that he had previously done so to Smith, and did not think it necessary or proper to repeat it; he presumed them all acquainted with the * fact, and did not think it to his interest, or proper for him to interfere with defendant's contract. Witness mentioned to **390** the defendant, some time before he sold out, that if the plaintiffs run him off the route, and he would permit him to become interested, he would join him. Witness subsequently took the entire possession of a small house belonging to defendant, and near his dwelling; that when he did so he took his drivers to board, and then by agreement with defendant, the sum to be paid him annually for rent of house, stables, shed, and interest, was \$1,000 being reduced to that sum from \$1,600. Witness received a bill of the purchase, and gave no note therefor; agreed to give for the rent of stable, board and interest, \$1,600 per annum. John V. Thompson advanced to witness, on account of the line, \$4,825; this amount placed with witness in September and October, 1825, as occasion required. Witness' brother John kept no bank book, that he knows of, nor did he know of his selling any stock, and paid him the \$4,825 in cash, and not in any instance by a check. Witness agreed to give defendant for the residue of his stages, horses and gears, \$1,050. Witness also purchased for cash, one stage in Philadelphia; never made any dividend; believes there was no profit made; as money was received, it was applied to bearing expenses and buying fresh horses, &c. Witness' brother John sold out to his brother William; no statement was then exhibited. Witness was to have the benefit derived from the stages. Witness rented of B. his stables, which were very large and spacious, and had been built by defendant many years before, for his own accommodation and use, at a heavy expense, when largely interested in stages; and also boarded with him, as he did his drivers, and was to give for the use of the stables, boarding of himself, drivers, infant child and servant, and the interest on the \$1,050 above mentioned, \$1,600; and said B. had convenient accommodations for boarding drivers; stables and kitchen were in the same yard. The two horses hired from Mr. B. being at the expense of wintering them, were returned to * him the March following, on demand by him. Said Thompson had become an insolvent debtor in 1822, and when he **391** established the line of stages as aforesaid, he thought it prudent to conceal his interest in the said line, (having before taken counsel) lest he might be embarrassed by his creditors, one of whom was the

United States. The defendant further offered in evidence by one Grant, that he, Grant, had lived with defendant for fifteen or twenty years before he sold out to the plaintiffs; that when he sold out, he dismissed witness, who remained out of employment from four to six weeks, except in going at the request of one of the owners of the Annapolis line, three times a week during part of that time, to attend the Annapolis stage. When Thompson commenced, he employed witness; he has since acted as Thompson's clerk, and settled with him weekly, or oftener, and paid over proceeds to him; never has known defendant in this matter since he sold out, and never knew or understood that he was concerned; never told McKean, or other person, that he, defendant, was concerned formerly, and before defendant sold out to the plaintiffs, he kept tavern, and Thompson lived with him, but never interfered with the business of staging; and since he sold out he has interfered and paid particular attention thereto; on the other hand, since the stages have been conducted by Thompson, the defendant has never interfered with the business, nor has this witness ever accounted to him, or paid over any thing to him, not considering him as having any thing to do therewith, but on the contrary, considering Thompson as the person interested therein, and his employer, and who employed him as his clerk, he, Thompson, acting as agent of his brother.* The witness states that when the defendant was the owner, he was very particular, and constantly examined the stages, &c. before they went out; he has never done so since. Witness, Thompson, upon being asked what he meant by using the term interest, when speaking of his not disclosing his intention to establish stages when the contract was signed,

392 says he has no recollection * of using the word; he was not intimate with any of the gentlemen, except Smith, and not upon intimate terms with him, and it would therefore be improper; that he did not mean to convey the idea that he had any interest in concealing his intention; he could not have so meant, because he had that very morning, on his return from Washington, so informed the said Smith. And the said defendant further proved by Stephen J. Thompson, that the following bill was rendered to him, said Thompson, by defendant: Mr. S. J. Thompson to John H. Barney.

"March 17, 1827, cash paid Wm. C. Gent, for hay, \$88.50; April 30, rent of stables, interest and board to this day, \$600; July 31, rent of dwellings, stables, &c. &c. three months, ending this day, \$250; Oct. 31, rent as above, \$250—\$1,388.50."

"1827, January 15 to 1st May, by various items of cash, \$537.66: 12th May, 1827, to the 17th November, by various items of cash, \$665.55.

Due J. H. B. \$185.29."

And then proved, that William C. Gent, mentioned in the first item of the last account referred to, was largely indebted to the Levy Court, and Mr. B. was treasurer of that Court: that the said Gent

paid at different times to said B. whose duty it was, as treasurer, to settle with him, various sums of money, who opened the account against said Gent, and recently closed it, by delivering Gent's note to the clerk of the now commissioners of the county, for the balance: and upon the cross examination by the plaintiff's counsel, of Stephen J. Thompson, he was required to produce all the quarterly settlements with defendant; he went to his office and returned, and produced the accounts offered in evidence by the defendant, and stated that he had looked for the other accounts: that the one now produced, was the only one he had been able to get—the others were at his house. Whereupon the plaintiffs counsel asked him whether the other accounts were headed in the same manner, to which the witness answered that he believed that * was the only account so headed; that the others, he believed, were all headed J. **393** Thompson, agent.

The defendant further offered evidence by Stephen J. Thompson, that the settlement made with the parties interested in the Union line to Philadelphia, for the winter of 1825 and 1826, was made at Elkton, between the parties concerned in said stages: that Samuel McDonald was not then and there present, and that such settlement was so made, with a recognition of said Thompson's interest, as agent, as aforesaid, and not as recognizing in Mr. B. an interest in any part of the said line from Baltimore to Philadelphia: that said Thompson assisted at said settlement, and said B. did not so assist. The defendant also proved, that William Thompson, brother of Stephen J. Thompson, is a rich man, and is doing an active business in the West Indies, but is now in the United States: and the defendant proved by George Beltzhoover, that while there was no opposition, he, as agent, bought of the plaintiffs half a stage and four horses, one in ill health and at the purchaser's risk, and which died before he received him, for the sum of \$2,000, which purchase gave him an interest in the line, and with a view to get them to stop at his tavern house. After the defendant closed his case, the plaintiffs called a witness, who proved that being written for by Grant, one of the witnesses of the defendant before mentioned, to come and drive for Thompson, he called upon said Grant, and told him he would not drive for Thompson. Grant then told him, you know what sort of a gentleman B. is; Thompson and I are only agents for defendant; that witness then replied he knew what sort of a man B. was, and if that were the case, he, the witness, would rather drive for B. than any other of the owners, but he doubted whether he would employ him, as witness had sued B. And also proved by said witness, that the defendant told Thompson to settle with witness, if he would drive for him, Thompson. Whereupon the plaintiffs, by their counsel, prayed the Court to direct the jury.

* First. If the jury shall find from the evidence, that a line of stages from Baltimore to Washington, was established **394**

about the month of October, 1825, in opposition to the line of stages on the said road, then owned by the said plaintiffs, and that the said line of stages, so established in opposition as aforesaid, continued to run in opposition to the aforesaid line of the plaintiffs until the institution of this suit: and if the jury shall also find that the defendant in this cause furnished the owners of the said opposition line with credit, money, horses, or any other means, in order the better to enable the owner or owners of the said opposition line to establish it and carry it on, and by reason of which means, so furnished, the said owners were the better enabled to establish it and carry it on, that then the plaintiffs are entitled to recover, notwithstanding the defendant may not own any of the horses, carriages, or other property employed in said opposition line.

Second. That by the contract on which this suit is brought, the defendant was bound not to assist in carrying on any line of stages, in opposition to the plaintiffs, on the road from Baltimore to Washington; and if the jury find the evidence that he did render assistance of any kind to the owners of a line of stages established on the said road in opposition to that of the plaintiffs, and that such assistance was rendered by him for the purpose of enabling the owners of the said opposition line the better to establish and carry it on; that the rendering of such assistance for such purpose, was a breach of the aforesaid contract, although the defendant may not have owned the aforesaid opposition line, or any part or portion thereof, or of the horses and stages employed thereon. Which directions the Court [ABCHEE, C. J., HANSON and KELL, A. J.] refused to give, but directed the jury that there was no evidence in this cause to show that the defendant had furnished the opposition line with credit, money, horses, or other means, in order the better to enable the opposition line to carry it on, but that the horses and other means

395 were sold by the * defendant to said opposition line, if the jury believe the testimony in the cause; and that such sale—if the jury believed that the horses and other means were owned and left on hand of defendant, at the time of contract between plaintiff and defendant, was no violation of the contract on the part of the defendant; and furthermore, that the letting Thompson have two horses for and in consideration of the wintering of them, to be returned in the spring, if the jury should believe they were occasionally run in the opposition line, was no violation of the contract, unless the jury should believe the said horses were purchased by the defendant with the view of assisting the opposition line, and that defendant let Thompson have them for that purpose. Whereupon the plaintiffs excepted.

2d Exception.—The evidence offered in the first bill of exception by plaintiffs and defendant, and which is to form a part of this bill of exception, having been given, the plaintiffs by their counsel prayed the Court to direct the jury upon the following prayers:

First. That if the jury find from the evidence that the defendant furnished the owners of the opposition line herein before mentioned, with two horses for the purpose of being used in the said opposition line of stages herein before mentioned, from September, 1825, until the spring following, for which the defendant was to pay nothing but the expenses of keeping them; and also that the defendant furnished the owners of the said opposition line with two other horses, three stages, and three sets of harness, for \$1,050, to be paid for when convenient, to a certain Stephen J. Thompson, for whose use and benefit the said opposition line was established; and if the jury also find that these means were furnished by the defendant as above mentioned, for the purpose of assisting in the establishment and support of the said opposition line; and that the said means, so furnished, did the better enable the owners thereof to establish and support the same; that then the plaintiffs are entitled to recover, notwithstanding the defendant was not an owner *or part owner of the said opposition line, or of any part or portion thereof, or of the property employed therein. **396**

Second. If the jury believe that John H. Barney, the defendant, lent Stephen J. Thompson three horses, for the purpose of being used in a line of stages in opposition to the plaintiffs, and which horses were so used, that then the plaintiffs are entitled to recover.

Third. If the jury shall believe that Stephen J. Thompson, after the 30th September, 1825, and before the institution of this suit, established and carried on a line of stages in opposition to the plaintiffs, and that John H. Barney, the defendant, hired to said Thompson stables, sold him carriages, horses and harness, for the purpose of being used and employed in such opposition line, then the plaintiffs are entitled to recover.

Fourth. If the jury shall find, from the testimony given in the trial of this action, that the defendant before the time of making the contract with the plaintiffs, set forth in the declaration, had been informed and knew at the time of making said contract, that it was the intention of Stephen J. Thompson to establish and carry on a line of stages between Baltimore and Washington, in opposition to the line owned by the plaintiffs on said road, and that the defendant afterwards furnished to the said Thompson such a portion of the means, advice and assistance necessary to establish and carry on such opposition line, as he could not otherwise have obtained, or without the aid of which the said Thompson could not have effected the establishment and carrying on of such opposition, the defendant knowing and intending that the means, advice and assistance furnished by him, would and should be so used by said Thompson, then the plaintiffs are entitled to recover.

Fifth. If the jury shall believe from the evidence, that the defendant, in making the sale of his horses, stages and harness, to Stephen J. Thompson, and contracting with him for the compensation to be

paid for the rent of stables and boarding of drivers, to be used in establishing and carrying * on a line of stages on the Washington road, in opposition to the plaintiffs, derived any benefit or advantage from the intended aid thereby to be afforded, in effecting the establishment, or of the carrying on of such opposition, then the defendant was concerned in such opposition, contrary to his agreement, and the plaintiffs are entitled to recover. Which several directions the Court refused to give. Whereupon the plaintiffs excepted.

The verdict and judgment deing for the defendant, the plaintiffs appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Meredith and Taney, (Att'y-Gen'l of Md.) for the appellants cited 9 *Massa. Rep.* 522, 524; *McElderry vs. Flannagan*, 1 *H. & G.* 320; *Fergusson vs. Tucker*, 2 *H. & G.* 189; *Drummond vs. Prestman*, 12 *Wheat.* 515; 1 *Stark. Evid.* 400; *Mason vs. Harrison & Boggs*, 5 *H. & J.* 480.

Johnson and Williams, (District Attorney U. S.) for the appellee, cited 8 *Massa. Rep.* 214; 18 *Ib.* 332; 4 *Oranch*, 62; 6 *Ib.* 226; 5 *Massa.* 10.

400 * BUCHANAN, C. J. delivered the opinion of the Court. This was an action of trespass on the case, for the alleged violation by the defendant of a contract, or engagement by him, with the appellants, dated at Baltimore, the 30th of September, 1825, which is in these terms: "I hereby acknowledge to have received of Messrs. David Barnum & Co. stage proprietors on the Washington and Baltimore Road, \$9,000, as a full compensation for the within named four teams and two coaches: and I bind myself to withdraw all my pretensions to any part of the said road, and I herewith deliver to the said company, the teams as they are at this instant on the road between this place and Washington, and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to them." This is written on the back of a letter from the defendant to one of the appellants, containing proposals of sale, to which it refers by the expressions, "for the within named four teams and coaches."

It appears that an opposition line of stages was very soon afterwards set up: upon which the question arose, whether the circumstances under which that opposition line was set up and carried on, amounted to a violation by the defendant of his contract. A great deal of parol evidence was offered at the trial, on both sides, and the case comes up on two bills of exception, taken to the refusal of the Court to give the instructions prayed for by counsel for the appellants, and to the direction that was given to the jury in reference to the testimony. The direction given to the jury, is in these words:

“that there was no evidence in this cause, to show that the defendant had furnished the opposition line with credit, money, horses, or other means, in order the better to enable the owners of the opposition line to carry it on, but that the horses and other means were sold by defendant to said opposition line, if the jury believe the testimony in the cause; and that such sale, if the jury believe that the horses and other means were owned and left on the hands of defendant, at the time of the contract between * plaintiffs and defendant, was no violation of the contract on the part of the 401 defendant; and furthermore, that the letting Thompson have two horses, for and in consideration of the wintering of them, to be returned in the spring,—if the jury should believe the evidence, although the jury should believe they were occasionally run in the opposition line, was no violation of the contract, unless the jury should believe the said horses were purchased by the defendant, with the view of assisting the opposition line, and that defendant let Thompson have them for that purpose.” This involves the construction of the contract, and also the question whether the direction of the Court amounted to an invasion of the province of the jury. The whole of the evidence being set out in the first bill of exception, it is unnecessary here to state it particularly.

In construing this contract, we must endeavor to arrive at the meaning of the parties, by looking to the motives that led to it, and the object intended to be effected by it. The motive, then, of the appellants, who were stage proprietors on the Washington and Baltimore road, was manifestly to become sole proprietors of all the stages on that road, and to shut out all opposition; and to effect that object, the purchase of the interest of the defendant, in a line of stages then running on the same road, was made. And it cannot be believed, that with such an object in view, they would have made the purchase with any other understanding than that the defendant should, in good faith, not only not become interested in any opposition line, but that he would not in any manner aid or become instrumental in the setting up or carrying on an opposition line. If that was not the understanding and intention, the purchase was a very wild and unmeaning one, as there were many ways in which the defendant, without being concerned in interest, might be concerned or engaged in promoting and encouraging the setting up and carrying on an opposition line, to their prejudice, and to the total loss of the amount given for the immediate interest bought out. The purchase was * not made for the purpose of throwing away, or giving 402 to the defendant, \$9,000, which would be the effect if he was at liberty and disposed so to act, immediately to lend his aid and patronage to the establishment of an opposition. But it was made for the purpose of shutting out all opposition, and securing to themselves the exclusive advantages of the road, so far at least as related in any manner to the defendant; to effect which object the conclud-

ing stipulation, "and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to them," would seem to have been introduced. The word *indirect* seems to us to have been used for the special purpose of guarding against any kind of interference by the defendant, in aiding or in any manner promoting, the establishment of, or carrying on, any opposition. Our construction therefore of the contract is, that the defendant could not, without violating the contract, set up or carry on, or knowingly aid or intermeddle, or in any way whatsoever, directly or indirectly, be concerned in setting up or carrying on any line of stages on that road, in opposition to the appellants; he was bought out for the purpose of being put entirely out of their way. Under any other construction, the word *indirect* would lose its office, and the object of the contract be defeated. Suppose the defendant, immediately after the contract, had given all the horses and stages he owned to a son, for the express purpose of setting up an opposition line to the appellants, or (under feelings of resentment for some cause or other) to a stranger, for the same purpose, and with a view of injuring the appellants, or had given a premium to any one to set up such a line of opposition, can it be doubted that in either case he would have broken his contract. He had the same right to sell any horses or stages that he owned at the time of the contract, that he had to sell any other property to whom he pleased, without intending that they should, or knowing that they were to be put to the purpose of setting up a line of opposition stages. But he could not have sold them to
403 any person for the express purpose of *being so used, without violating his contract; nor had he under his contract any right to loan or hire any of his horses to the owners of the opposition line, for the purpose of being used on such line. And in the case of his hiring or lending any of his horses to the owners of the opposition line, for the purpose of being used on such line, we do not perceive that it would make any difference whether they had belonged to him before, or whether they were purchased by him for that purpose, the breach of the contract consisting in his assisting the opposition line by letting the owners have them for that purpose.

It is our opinion, therefore, that if the defendant did furnish the owners of the opposition line with money, credit, or other means, for the purpose of enabling them to establish and carry on that line; and that the means so furnished, did enable them to establish and carry it on; and that they could not have established or carried it on without such means, so furnished by the defendant; or that he did furnish them with money, credit, horses, or any other means, for the purpose of enabling them the better to establish or carry on that line; and that such means did enable them the better to establish or carry it on, the appellants were entitled to recover, and that there was legal and competent evidence in the cause, tending to prove either of those propositions, which ought to have been submitted to

the jury for their decision upon its effect. The general rule being, that where there is any legal admissible evidence, tending to prove the issue, the effect of that evidence is solely for the consideration of the jury. Though we have said the testimony taken at the trial ought to have been left to the jury, as tending to prove the issue on the part of the appellants, we wish to be distinctly understood as intending to express no opinion touching the effect of that evidence, further than that it was fit to be left to the jury for their consideration, to pass for whatever it was worth, and have therefore intentionally avoided commenting on any part of it, to show in what it tended to prove the issue, or any *material fact in the cause.

There seems to be an impression at the bar, that this Court **404** has held the measure and quantity of proof to be a question of law, and the case of *Davis vs. Davis et al.* 7 H. & J. 36, is commonly relied upon in support of that doctrine. We by no means mean to shake the authority of that case, but think it has been misunderstood. When there is no evidence applicable to the issue, or tending to prove any material fact, a total failure of evidence, the Court will direct the jury accordingly; and that we conceive to be the doctrine of *Davis vs. Davis et al.* The expressions used are intended to be applicable to the facts of that case; and so applied, they are not, we apprehend, opposed to the principle here asserted, that if there be any evidence tending to the proof of the issue, however weak, it ought to be submitted to the consideration of the jury. Under this view of the subject, we dissent from the opinion of the Court below, on both bills of exception, and we think the direction of the Court, that there was no evidence in the cause to show that the defendant had furnished the opposition line with credit, money, horses, or other means, in order the better to enable the owners of that line to carry it on, was an invasion of the province of the jury, to whom that question ought, upon the evidence, to have been left.

Judgment reversed, and procedendo awarded.

WILLIAM JESSOP vs. SAMUEL BROWN, JR.—June, 1830.

Where at the time a sheriff under a *fl. fa.* levied upon personal and real property, pointed out by the plaintiff as the property of the defendant, a claim was made thereto by third persons, who denied the right of the sheriff to levy upon or sell the same, and threatened to sue him if he should sell the same; and the sheriff then informed the plaintiff that unless he would indemnify him, he would not sell. Upon motion made at the return term of the writ, (founded upon the foregoing facts, sustained by * affidavits and copies of deeds and mortgages from the defendant to the claimants, and proof of the plaintiff's refusal to indemnify the sheriff) the Court granted a rule absolute either to indemnify the sheriff, or permit him to enlarge the time of making his return, from term to term, until that was done; and again enlarged the time for making his return to the first day of the next term. **105**

A *FIERI FACIAS* issued in this case, returnable in June Term, 1829. At that term a motion was made on the part of the plaintiff, for a rule on the sheriff of Anne Arundel County, to whom the said writ was directed, to return the same, the said sheriff having failed so to do. The rule was granted, requiring the sheriff to make his return on the 5th day of July then next ensuing, but at a subsequent period, during term, the time was extended to the 1st day of this term.

Brewer, for the sheriff, now moved the Court for a rule on the plaintiff, to show cause why the above rule should not be enlarged to the next term, and why he should not indemnify the sheriff before the said writ should be returned. And he assigned the following reasons: "1. Because the greatest part of the property, both real and personal, on which the said *feri facias* was levied, was conveyed to a certain Rebecca Goodwin and Eliza Goodwin, and a certain Richard G. Stockett, and the residue was claimed at the time of the levy, by Samuel Brown, father of the said defendant. And the said plaintiff who showed the said property, was then and there informed by the sheriff that he would not sell the said property, unless the said plaintiff would give him a sufficient indemnity, which the said plaintiff then and there repeatedly refused. 2. Because all the said property was claimed by the said Rebecca and Eliza Goodwin and Samuel Brown, who denied the right of the said sheriff to levy on and sell the same, and threatened to institute a suit against the said sheriff, if he should proceed to sell the same."

406 * Affidavits by the sheriff and his deputy were filed, and copies of a deed and mortgage from the said defendant to the above named Rebecca and Eliza Goodwin. The facts set forth in the reasons were supported by the affidavits. In support of the rule he referred to 1 *East*, 338; 3 *Bos. and Pul.* 288; 2 *Tids. Prac.* 928; 7 *Term Rep.* 174; *Sellon's Prac.* 527.

BUCHANAN, C. J. In enlarging the rule in this case, the Court wish to be understood as laying down no general rule. Each case must depend upon its own circumstances; and here we think, upon the reasons and proofs, there is sufficient reason to interfere.

Rule on the plaintiff made absolute, and the rule on the sheriff enlarged to the first day of the next term.

STATE OF MARYLAND *vs.* LABAN WALSH.—June, 1830.

A final release under the insolvent laws of this State, obtained by a debtor to the State, after judgment rendered against him, will protect him from a *ca. sa.* on such judgment: and if arrested, the Court will discharge him on motion.

APPEAL from Baltimore County Court. At March Term, 1825, the State of Maryland recovered judgment in an action of debt, against Laban Walsh, the appellee, who was a security in the bond of one of the collectors of the State tax, and in that character indebted to the State. On the 11th October, 1828, the appellee was reported to be entitled to his final discharge under the insolvent laws of the State, by the commissioners of insolvent debtors for the City and County of Baltimore, and on that day was accordingly discharged by Baltimore County Court. On the 23rd March, 1829, the State sued out a writ of *capias ad satisfaciendum* on the aforesaid judgment,* and the appellee was arrested, and brought before Baltimore **407** County Court for commitment. He thereupon moved the Court for his discharge from the custody of the sheriff, on the ground that he had applied for the benefit of the insolvent laws of Maryland, and obtained a final discharge since the rendition of the judgment aforesaid. And Baltimore County Court [ARCHER, C. J.] accordingly discharged him. The State appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and STEPHEN, JJ.

Taney, (Att'y-Genl.), and *Gill*, for the State, contended that the insolvent laws of Maryland do not apply to the State. The State is not a creditor within their meaning; and the rights of the State against the persons of her debtors, are not restrained by them. They said that the insolvent laws of Maryland did not bar the State in the prosecution and recovery of her debts. The Act of 1805, ch. 110, was the basis of the system, and when first enacted was a mere private Act, for the relief of the persons mentioned in it.

* When the Legislature was making these various provisions requiring assent of creditors, and notice to creditors to be **408** given, and authorizing creditors to proceed against a fraudulent insolvent, it could not have escaped their attention, that no officer was empowered to act for the public—none entrusted to give the required assent to confer jurisdiction on the discharging Court; none indicated to whom notice might be given, nor whose duty it was to take notice of the advertisement. Under these omissions in material and important particulars, essential to preserve the integrity of the system, to confer jurisdiction on the Court, and guard the rights of creditors, and consequently directly affecting the debts of the public, and leaving the State, in her character of creditor, entirely unrepresented, it is insisted that she is not a creditor within the spirit and meaning of the original system, and was not intended to be barred by it. There is no power short of the Legislature which can release a public debt; and when that authority, acting in the ordinary course of legislation, passes a law releasing debts generally, without any particular mention of the State, a question arises upon a fair con-

struction of the whole law, whether the State's debts were intended to be released.

410 *They cited Acts of 1805, ch. 110, sec. 2; 1807, ch. 150, sec. 4; 1812, ch. 77, sec. 2, 5; *Cox Dig.* 638; *Pennington vs. Coxe*, 2 *Cranch*, 33, 52; *State vs. Stump*, 2 *H. & McH.* 174; *Murray vs. Ridley*, 3 *H. & McH.* 177; *Wood vs. Repold*, 3 *H. & J.* 127; *State vs. Rogers and Wife*, 2 *H. & McH.* 198; *Contee vs. Chews*, 1 *H. & J.* 417; *Kip vs. Bank New York*, 10 *Johns.* 63; *Kennedy vs. Strong*, 10 *Johns.* 289; Act of 1792, ch. 51.

No counsel appeared for the appellee.

Judgment affirmed.

BARGER *et ux.* Ex'rs of ATHEY vs. COLLINS.—June, 1830.

A. proved a settlement with C. on the 1st March, 1820, shewing a balance due him of \$1,018, for building certain houses. C. under notice of set-off, established payments to the amount of \$195; and to shew that A. had no separate right of action, proved that he was a partner in two firms, one of which furnished the bricks, and the other did the brick work of the houses, and both of which rendered accounts in 1818 and '19, amounting to \$2,850, for their respective claims. He also proved various receipts, during the same years, of the individual partners of those firms for payments made to them—some on account of such buildings generally—some for bricks,—some for brick work, amounting in the whole to \$1,810. A. then offered to prove by one of his former partners, that his firm was dissolved about the close of 1819, and its debts assigned to A. The County Court admitted the witness, and held that the settlement in 1820, was evidence of C's knowledge of the dissolution of that firm, and the transfer of its debts to A.; but no evidence of the dissolution of the other firm being given, that Court also decided that the whole evidence did not furnish competent proof of any balance being due to A. individually. Upon appeal, held that this was a question of fact for the jury.

APPEAL from Baltimore County Court. Action of assumpsit. The declaration contained counts for work and labor, and materials found and provided, &c. For money laid out and expended; and on an *insimul computassent*. *The defendant, (the appellee,) gave **411** notice of a set-off, and pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiffs, (now appellants,) to support the issue on their part, and for the purpose of shewing that the defendant was indebted to the testator of the plaintiffs, offered in evidence the following paper, admitted to be in the hand-writing of the defendant:

("No. 1.) Settlement of accounts this 1st day of March, 1820, with Walter F. Athey, for bricks and brick-work, and I do hereby acknowledge the following balance to be correct:

Balance on Mr. Higginbotham's house, Franklin street.....	\$ 10 00
Balance on six buildings, North Charles street..	964 01
On my account.....	39 61
	<hr/>
	\$1,013 62

Balance of one thousand and thirteen dollars and sixty-two cents.

JAMES W. COLLINS."

Whereupon the defendant proved, under the notice of set-off, that he had paid for the use of Athey in his life-time, the following sums, to wit, \$20, \$30, \$145; and for the purpose of shewing that the bricks furnished for the six buildings in N. Charles street, as mentioned in the above paper offered in evidence by the plaintiffs, were furnished by Athey and a certain George Shoemaker, as co-partners in the brick making business, under the firm of George Shoemaker & Co. and that the brick-work done in the six buildings was done by the said Athey and a certain Deter Barger, as co-partners in the brick-laying business, under the firm of W. F. Athey and D. Barger, and that neither the bricks furnished, nor any of the brick work done, by Athey in his individual character; the defendant produced and read in evidence the following accounts, which were admitted to be in the hand-writing of Athey:

* "No. 2. Mr. James W. Collins and others, for six houses in N. Charles street, to George Shoemaker & Co. 412

1818, Sept. To 348,500 bricks, at \$8 pr. th.....	\$2,788 00
To 33,000 front bricks, at \$15 pr. th.....	495 00
To 150 long arch bricks, at \$7 pr. hun...	10 50
To 110 rubbing bricks, at \$7 pr. th.....	7 70

\$3,301 20

Cr. By 2,000 front brick, at 15 dollars pr. th..... \$30 00

Cr. By 450 common brick, at 8 dollars pr. th..... 5 20

Cr. By cash at sundry times....2,500 00

2,535 20

\$766 00

To W. F. Athey and D. Barger,

To laying 379,000 brick, at 3.50 pr. th....	\$1,326 50
To laying 16,500 old brick, at 3.50 pr. th.	57 75
To pointing out roof of Boehme's house..	1 00
To poles, ropes, filing and penciling front.	50 00

Carried forward.....\$1,435 25

Brought forward.....	\$1,435 25
Cr. By mortar, at sundry times.....	3 00
	<hr/>
	\$1,432 25
	776 00
	<hr/>
Balance	\$2,198 25
Turner Morehead's bill of dry goods.....	275 75
	<hr/>
	\$1,922 50"

413 * "3. Mr. James W. Collins and others, to Geo. Shoemaker & Co.

1819, Apl. 17.	To 1,500 paving bricks, at \$11 pr. th..	\$ 16 50
	To 6,500 front bricks, at \$15 pr. th....	97 50
Aug. 16.	To 59,000 common bricks, \$8 pr. th ..	472 00
	To 17,935 paving bricks, at 9.50 pr. th ..	170 38
		<hr/>
		\$756 38

To W. F. Athey and D. Barger.

	To laying 64,000 bricks, at 3.50 pr. th..	\$224 00
Aug. 16.	To paving 505 yards back and front, at 15 cts. pr. yd.....	75 75
	To digging for pavement and back wall.	3 00
	To building five cake ovens, at 2 dollars each, extra.....	10 00
		<hr/>
		\$312 75

Cr. By cash.....	\$128 50
Cr. By 390 common bricks, at 8 dollars pr. th.....	3 12
Cr. By 326 paving brick, at 9.50	3 09½
Cr. By 403 front brick, at 15 pr. th.....	6 04½
Cr. mortar, at sundry times.	1 17½
Cr. By 2¼ bushels lime, at 40 cts.....	90
	<hr/>
	142 83½
	<hr/>
	\$169 92½
To 4 bushels lime got of Sinclair, at 40 cts.....	1 60
	<hr/>
	\$171 52½"

* And for the purpose of shewing, that when money was paid to either of said parties on account of bricks or of brick-work as aforesaid, the respective party receiving the same gave receipts in his individual name; the defendant further gave in evidence the following receipts, which were all admitted to be in the handwriting of the several parties whose names are signed thereto,

"No. 4. Baltimore, June the 30th, 1818, Received of James W. Collins, \$200 on acc. of six buildings. WALTER F. ATHEY.

"Baltimore, July 9th, 1818, Received of James W. Collins, \$500 on acc. WALTER F. ATHEY.

"No. 5. Baltimore, July 17, 1818, Received of James W. Collins, \$130 on acc. of brick delivered for the six buildings on North Charles street. GEORGE SHOEMAKER.

"No. 6. Baltimore, August the 15th, 1818, Received of James W. Collins, \$50 on acc. brick-work on the six buildings N. Charles street. D. BARGER.

"No. 7. Baltimore, July the 31st, 1818, Received of James W. Collins, \$150 on acc. brick delivered for the six buildings on North Charles street. GEORGE SHOEMAKER.

"Baltimore, July the 25th, 1818, Received of James W. Collins, \$70 on acc. of brick-work, and on the first day of August \$70. \$140. DETER BARGER.

"Baltimore, August 17, 1818, Received of James W. Collins, \$120 on acc. of brick delivered at the six buildings North Charles street. GEORGE SHOEMAKER.

"Baltimore, August the 8th, 1818, Received of James W. Collins, \$70 on acc. of brick-work on the six buildings on North Charles street. DETER BARGER."

And the defendant also offered in evidence the following account, and receipt thereon.

"Mr. William Robinson to W. F. Athey, and D. Barger, 415
* 1819, June. To digging for pavement, front and

rear.....	\$1 50
To setting stone steps and mending wall....	3 50
To finding some mortar for fire-place.....	25
To repairing wall of smoke house.....	75
To laying 3,500 bricks in pavements, &c. at	
\$3.50	10 50

\$16 50

Cr. By laying 800 bricks, at \$3.50 per th..... 2 80

\$13 70

1820, Feb'y 28. Received a note on demand for the above.

W. F. ATHEY & D. BARGER.

To George Shoemaker & Co.

June 28.	To 500 front brick, at \$15 per th.....	\$ 7 50
	To 3,000 paving brick, at \$10 per th.....	30 00
		<hr/>
		\$37 50
	Cr. By 250 bricks, at \$8 per th.....	2 00
		<hr/>
		\$35 50

1820, Feb'y 28. Received a note on demand for the above.

GEO. SHOEMAKER & CO.

Admitted to be in the hand-writing of the said Walter F. Athey.

And also proved by the said William Robinson, that at the time of the payment thereof, to wit, on the 28th of February, 1820, he had not heard of any dissolution of the said co-partnership of George Shoemaker & Co. and did not hear of any dissolution thereof until some time afterwards. And also gave in evidence the following account, and receipt thereon :

"Mr. Charles L. Boehme to W. F. Athey & D. Barger.

1818, May 15.	To repairing pavement at the alley ...	\$ 1 00
	To 20 paving brick, at \$11.....	22
Sep. 26.	To filing and penciling front.....	12 00
		<hr/>
		\$13 22

416. * Received payment in full of the above, 13th October, 1820. W. F. ATHEY & D. BARGER."

Also admitted to be in the hand-writing of the said Walter F. Athey; and also proved by Charles L. Boehme, that at the time of the payment thereof, to wit, in December, 1820, he had not heard of any dissolution of the partnership of the said Athey & Barger.

The plaintiffs then further gave evidence by the said George Shoemaker, that the copartnership formerly existing between him and the said Athey, was dissolved about the beginning of December, 1819, and that in a short time thereafter, and before the 1st of March, 1820, he, the witness, assigned, for a valuable consideration, all his right and interest in said co-partnership concern, to the said Athey; that the said copartnership was not indebted to any person at the time of such assignment; and that during the continuance of the said copartnership in the years 1818, and 1819, they furnished to the defendant for the aforesaid six buildings, between 500,000 and 600,000 bricks, at various prices, from 8 to 15 dollars per thousand.

The defendant, by his counsel, then objected to the admissibility of the said George Shoemaker as a witness, to prove either the dissolution of the copartnership of George Shoemaker and Co. in December, 1819, or that there was an assignment of all his interest in the claims of the said copartnership by the witness, to the said Athey, or that there were no debts due from the said copartnership at the time of such assignment; and also objected to the admissi-

bility of the paper herein first given in evidence by the plaintiffs, as evidence of the knowledge by the defendant of the dissolution of the copartnership of George Shoemaker & Co. and of defendant's knowledge of an assignment of all witness' interest in the claims of said copartnership, to the said Athey, by the said Shoemaker. But the Court overruled all the aforesaid objections. Thereupon *the defendant, by his counsel, moved the Court for their 417 opinion and direction to the jury, that upon all the foregoing evidence the plaintiffs are not entitled to recover in this action, because said evidence does not show any dissolution of the copartnership of W. F. Athey and D. Barger, in the brick-laying business, or any assignment of its claims, or any knowledge thereof by the defendant; and because the whole of said evidence does not furnish legal or competent proof to go to the jury, of any balance due from the defendant to the said Athey, in his life-time, or, if of any balance, not of greater amount than the aforesaid set-off, proved as aforesaid, upon which this action can be maintained; which opinion and direction the Court, [ARCHER, C. J. and KELL, A. J. gave.] The plaintiffs excepted, and the verdict and judgment being for the defendant, the plaintiffs appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Moale and *S. I. Donaldson*, for the appellants, *cited *Davis* 418 vs. *Davis*, 7 H. & J. 37; *Barger vs. Collins*, *Ib.* 219; *Allstan* vs. *Contee*, 4 H. & J. 352; *Laidlaw vs. Organ*, 2 Wheat. 182.

Williams, (District Attorney U. S.) for the appellee, cited *Allstan* vs. *Contee*, 4 H. & J. 351; *Onion vs. Paul*, 1 H. & J. 114; *Davis* vs. *Davis*, 7 H. & J. 36; *Fergusson vs. Tucker*, 2 H. & G. 189; *Bell* vs. *Morrison*, 1 Peters S. C. R. 366; 1 *Petersdorf*, 157; *Brazier vs. Clap*, 5 *Massa. Rep.* 10; 2 *Harr. Index*, 89.

EARLE, J. delivered the opinion of the Court. The Court below delivered an opinion and directed the jury, in this case, that upon all the evidence in the cause, the plaintiffs were not entitled to recover, because such evidence did not show any dissolution of the partnership between Athey and Barger, in the brick-laying business, or any assignment of its claims, or any knowledge thereof by Collins, the defendant; and because the whole of the said evidence, did not furnish legal, or competent proof to go to *the jury of any balance due from the defendant to Athey, in his life-time, or if 419 any balance, not of greater amount than the set-off proved by him, upon which the action could be maintained. If the Court were right as to the dissolution of the partnership between Athey and Barger, they were clearly in error as to the remaining part of the direction. The accounts of 1818, and 1819, produced by the defendant in the hand-writing of Athey, became evidence in behalf of his estate, and

it may be, that by their assistance, the plaintiffs might have been able to separate the debt due to Shoemaker and Athey, from the debt due to Athey and Barger, and thereby to show what proportion of the large item of \$964.01, in the settled account of the 1st of March, 1820, belonged to the former partnership. For this, under the evidence given, added to the first and third items of the account, which were undisputed, they might have been entitled to a verdict, subject to a deduction of the sum of the set-off, which was also proved. We do not pretend to say, that from this source, the plaintiffs would have succeeded to establish this part of their demand against the defendant. This point the jury alone would have the right to decide; and that the plaintiffs were deprived of the use of this proof, by the directions of the Court.

All we mean to signify is, that the accounts of 1818 and 1819, might have been used for this purpose by the plaintiffs, and that it should have been left to them to make the attempt, if they had seen proper to do so. We intend alone to say that those accounts were legal, and competent proof to go to the jury, of the balance due from the defendant to Athey in his life-time. The judgment must be reversed, and the case sent back on a *procedendo*.

Judgment reversed, and procedendo awarded.

G. and T. were seized in fee, as tenants in common, of a tract of land called the Valley of Owen. T. contracted with G. for the purchase of his moiety and paid the purchase money, upon which G. executed and delivered to T. a deed for "all that one equal undivided half part of a tract of land called the Valley of Owen, which was sold by G. to T. (and which at the instance of the said T. to secure the payment of the purchase money to M., G. had conveyed to M. by the name of Glen Owen, and the said purchase money being fully paid to M. the said M. by deed, has this day conveyed to said T.) together with all the advantages and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title and interest whatsoever, at law and in equity of the said G. of, in, and to the same." This deed also contained a covenant for further assurance. T. filed his bill for further assurance, alleging that his deed did not convey to him a clear and undisputed title to the tract called the Valley of Owen, with all the advantages incident thereto, and as the same might be enjoyed under the original patent thereof. *Held*, that this was a valid deed to pass to complainant all the right of G. to a moiety of the tract of land called Valley of Owen.

APPEAL from the Court of Chancery. The bill of the complainant, Allen Thomas, (the present appellee,) which was filed on the 3d of July, 1826, stated, that William Gwynn, (the appellant,) and the complainant, were entitled to a tract of land lying in Anne Arundel

County, called "The Valley of Owen," as tenants in common, and being so entitled, the complainant for the purpose of acquiring a title to the whole tract in severalty, contracted with the said Gwynn for the purchase of his moiety of said tract, for a large sum of money. That the complainant hath since paid the whole purchase money, and that said Gwynn, in colorable execution of his contract, on the 16th February, 1826, executed and delivered to a friend of complainant, acting in his behalf, a deed, a copy of which is exhibited, marked A, which said deed, complainant alleges, does not convey to him a clear and undisputed title to the said tract, called "The Valley of Owen," with all the advantages incident thereto, and as the same might be enjoyed under the original patent thereof. That when apprised of * the defect in the conveyance so executed, the complainant caused application to be made to the said **421** Gwynn for another conveyance, which should more perfectly execute the contract between him and complainant, but that said Gwynn refuses to make, or execute any other conveyance, though the deed already executed and exhibited, contains a clause for further assurance. Prayer, that the said Gwynn may be decreed to convey to complainant, the said tract called "The Valley of Owen," by a deed to be prepared under the direction of the Court of Chancery, and for general relief. Exhibit A, is the deed from the appellee to the appellant, bearing date on the 16th day of February, 1826, whereby, in consideration of the sum of \$4,200, paid by the appellee to the appellant, through the Mechanics Bank of Baltimore, the appellant conveyed to the appellee in fee simple, the premises as described in the opinion of this Court.

The answer of Gwynn stated, that the whole tract called "The Valley of Owen," was conveyed to him by certain trustees appointed by the Court of Chancery, and of whom he had purchased, by deed bearing date on the 11th of February, 1814, an authenticated copy of which deed is exhibited with the answer. That, whilst the title to the whole tract was so vested in him, he, on the 9th of November, 1816, obtained a special warrant of resurvey, on the said tract called "The Valley of Owen," which was executed on the 24th of October, 1817; that whilst the surveyor was employed in executing the said warrant, the defendant being desirous of settling and quieting certain doubts, which existed as to the true location of the third line of the said tract, entered into an agreement, on the said 27th October, 1817, with the owners, or persons supposed to own lands binding on said line, to wit, George Ellicott and others, to adjust and fix the same: which agreement was reduced to writing, and signed by the respective parties concerned, and the said line was accordingly so adjusted, and was referred to and described by the surveyor in his certificate, * made in pursuance of the said warrant, and also in the patent, issued on the said certificate, so resurveyed by **422** the name of "Glen Owen," as appears by the said patent, which

bears date on the first of February, 1819, a copy of which is exhibited with the answer. The answer further states, that the defendant purchased the said tract from the said trustees, on joint account, with one John Conrad, of Philadelphia, who was to have a joint and equal interest with him, and who was to pay one-half of the purchase money; that after the said Conrad had paid a portion of his moiety of the said purchase money, his interest in the said land, was conveyed to other persons, by whom the residue of said Conrad's moiety was paid, and that subsequently the said moiety of the said Conrad became mortgaged on the 15th of October, 1819, to a certain Henry Thompson and Talbot Jones, and others, who filed a bill on the said mortgage, and on the 27th of July, 1820, a decree was passed for the sale of the said premises, and this defendant was appointed trustee for the purpose of selling the same, as by the proceedings in said cause will appear; that the defendant, in his advertisement of sale, under said decree, described the said land, as one undivided moiety of a tract called "Glen Owen," the name given to it on making the resurvey, and that the complainant was the highest bidder, and purchaser of the same at said sale, at \$16 per acre, and by the name of "Glen Owen," as will appear by a written acknowledgment of such purchase, signed by the complainant, herewith produced and exhibited; that in his report of the sale so made to the Chancellor, this defendant stated that he had sold the same to the complainant, as an undivided moiety of a tract of land called The Valley of Owen, and lately resurveyed by the name of "Glen Owen," and that the complainant having complied with the terms, this defendant on the 10th of March, 1823, conveyed the same to him accordingly; that on or about the 19th October, 1821, this defendant mortgaged his undivided half of the said tract of land by the name of "Glen Owen," to

423 the * President and Directors of the Mechanics Bank of Baltimore, and that after it was so mortgaged, and after the complainant had purchased the other undivided moiety as aforesaid, that is to say, in February, 1822, the defendant agreed to sell his undivided moiety of said land to the complainant, the defendant having previously ascertained that the Mechanics Bank would confirm the sale, whereupon the complainant was authorized, and did take possession of the same. The defendant admits that he contracted to sell the said land by whatever name the same might be called, but insists that such contract and sale was made with full knowledge on the part of the complainant, of the resurvey, and the before mentioned agreement in writing, relative to the adjustment of one of the lines of said tract. The answer further states, that upon the payment of the mortgage debt to the said Mechanics Bank, which debt was the consideration to be paid by the complainant to him for the said land, he, the defendant, at the request of the complainant, executed the deed referred to, and exhibited with the bill;

and he submits whether he ought under the circumstances, to make any other or further deed in the premises.

The exhibits filed with the answer it is not deemed necessary to set out, nor is it necessary to refer to the proof taken under the commissions which issued in the cause.

The general replication was filed to the answer.

BLAND, C. (March Term, 1827.) It appears that the defendant, on the 11th of February, 1814, as a purchaser under decree of this Court obtained a deed, and thus became legally seized in fee simple of the whole of a tract of land called "The Valley of Owen." That of this tract, the legal title of which was thus vested in him, a certain John Conrad, was by agreement, entitled to one undivided moiety, which Conrad conveyed to Edward Gray and Robert Taylor, and by them it was transferred to the Patapsco Manufacturing Company; that they mortgaged it to Henry Thompson, Talbot Jones and others; and that it was afterwards, at the suit of these mortgagees, * (this defendant, William Gwynn, being a party to that suit,) sold under a decree of this Court; on which sale this plain- 424
tiff, Allen Thomas, became the purchaser, and has thus obtained a legal title in fee simple, to one undivided moiety of this tract called "The Valley of Owen," as particularly appears by the order of the 20th of August, 1825, in that suit, and the deed of the 19th of September of the same year, (these papers were returned with the commission.) Thus far this case is clear of all ambiguity or controversy.

But it appears by an agreement dated on the 24th of October, 1817, that the third line of this tract, called "The Valley of Owen," separated lands wherein five distinct parties were interested; that doubts were entertained by them as to its true location, and that it was the object of the agreement to fix its position beyond dispute. Accordingly with this view, a warrant of resurvey was obtained by William Gwynn for this tract, called "The Valley of Owen," by which its third line was located in pursuance of the agreement, and a certificate returned, and on the first of February, 1819, a patent obtained thereon for this land, by the name of "Glen Owen." It is this new name which has caused the confusion, and been the occasion of this suit. But by bringing the direct rays of a few particulars to bear upon this matter, the mist which has obscured it, may be readily dispersed.

William Gwynn, it must be recollected, became seized of the whole of this tract of land by the name of "The Valley of Owen," the one undivided moiety of which, by that name, we have traced from him into the hands of the plaintiff. This bill alleges that after the plaintiff had obtained a title to one undivided moiety of "The Valley of Owen," he purchased the other moiety of the same tract of the defendant. This defendant in his answer says, that on the 19th of October, 1821, (which was some time after he had purchased the tract,

and obtained a patent for it, by the name of "Glen Owen,") he mortgaged his moiety of it by the name of "Glen Owen," to the Mechanics Bank; and * after he had done so, he says in his answer, **425** that he "admits that he agreed to sell and convey all his right, title, and estate, legal and equitable, in and to the said undivided moiety of the said tract of land, by whatsoever name it was or had been called, to the complainant; but charges that such agreement and sale was made, with a full knowledge on the part of the complainant, of the resurvey, the agreement in writing with George Ellicott and others, and the mortgage. This admission is corroborated by the proofs from which it appears, that the defendant agreed, and stipulated to sell his moiety of this tract of land to the plaintiff, by the name of "The Valley of Owen."

It is perfectly clear then, that according to the contract, between these parties, as alleged, admitted and proved, this plaintiff is entitled to a conveyance from this defendant of the undivided moiety held by him of the tract of land called "The Valley of Owen."

The operation of the agreement on which the resurvey was founded, and the effect of the notice which it is alleged the plaintiff had of that agreement, are matters foreign from present enquiry. The nature, and extent of the contract between the parties, has been clearly shown and established. It has been complied with by the plaintiff, and he is therefore now entitled to have it fulfilled by the defendant.

Decreed, that the said defendant William Gwynn do, and he is hereby commanded forthwith, to convey by a good and valid deed, made, executed, acknowledged, and delivered, according to law, all his right, title, and interest, of, in and to the said undivided moiety of the tract of land in the proceedings mentioned, called "The Valley of Owen," unto the said plaintiff Allen Thomas, to have and to hold to him, his heirs, and assigns, in fee simple, &c. and that defendant pay complainant his costs.

From this decree, the defendant appealed to the Court of Appeals.

* The cause was argued before BUCHANAN, C. J., EARLE, **426** STEPHEN, and ARCHER, JJ.

Johnson, for the appellant, contended, that if the defendant below was bound to convey "The Valley of Owen," he had before the filing of the complainant's bill done so, by his deed to the complainant of the 16th February, 1826. 13 *Johns. Rep.* 359; *Gazley vs. Price*, 16 *Ib.* 267; *Miller vs. Parsons*, *Ib.* 336; 9 *Johns. Reps.* 336.

Magruder and Alexander, for the appellee, contended, that the deed of February, 1826, was not so free from ambiguity, that a reasonable doubt might not be entertained, whether it did, or did not convey "The Valley of Owen," and therefore the grantee might call for another deed. The cases referred to on the other side, were cases at law for supposed breaches of covenant. It was not possible for the

complainant to exhibit a deed to the defendant, such as he was entitled to, previously to the filing of the bill; the application to the Chancellor, being not only for a deed, but he was to prescribe such an one, as complainant was entitled to; they referred to *Buchanan vs. Stewart*, 3 H. & J. 329; and on the question of costs, to *Jenour vs. Jenour*, 10 Vesey, 571.

BUCHANAN, C. J. delivered the opinion of the Court. The complainant in this case, alleges a contract with William Gwynn, the appellant, for the purchase of an undivided * moiety of a tract of land called "The Valley of Owen," and states that the ap- 427
pellant, in colorable execution of his contract, had made to him a deed which he refers to, and exhibits as a part of his bill; but alleging that he has been advised it does not convey to him, a clear and indisputable title to the land called "The Valley of Owen," with all the advantages incident thereto, seeks to obtain another deed in execution of the contract, and in pursuance of the covenant for further assurance contained in the deed objected to, but without pointing out the supposed defects in that deed.

The premises conveyed by that deed are described to be "all that one equal undivided half part, or moiety of a tract or parcel of land, lying in Anne Arundel County aforesaid, called 'The Valley of Owen,' which was sold by the said William Gwynn, to the said Allen Thomas, on the twelfth day of February, in the year 1822, (and which at his instance to secure the payment of the purchase money to the Mechanics Bank of Baltimore, the said William Gwynn conveyed by the name of 'Glen Owen,' to the President and Directors of the Mechanics Bank of Baltimore, and the said purchase money being fully paid to the said bank, the said President and Directors, by deed of the same date, have conveyed to the said Allen Thomas,) together with all and singular, the buildings and improvements, ways, water-courses, rights, privileges, advantages, and appurtenances thereto belonging, or in any wise appertaining; and all the estate, right, title, interest, trust, property, claim and demand, whatsoever, at law, and in equity of the said William Gwynn, of, in, and to the same." There is in the deed a special warranty with a covenant for such further and other deed, conveyance and assurance, as may reasonably be required, "for the better and more fully conveying and assuring to the complainant, his heirs and assigns, "all the right, title, estate and interest, at law and in equity, which the said William Gwynn can lawfully claim, in and to the said premises, with the appurtenances."

*The appellant in his answer, among other things says, 428
that he made the deed so referred to, and exhibited by the bill, at the request of the complainant, and submits to the Chancellor whether he ought, under the circumstances set out in his answer, to make any further deed.

Several commissions were issued, and evidence taken in the cause, and on final hearing the Chancellor decreed that the appellant should forthwith convey to the complainant by a good and valid deed, all his right, title and interest, of, in, and to one undivided moiety of the tract of land called "The Valley of Owen," and that he should pay all the costs. From which decree the case is brought by appeal to this Court.

In the view in which this case presents itself to us, it does not seem to be necessary to enquire into the nature and extent of the original contract between the parties, or whether the complainant was, or was not entitled to a conveyance of one undivided moiety of the tract of land called "The Valley of Owen," under that contract, for admitting the contract to have been as alleged in the bill, and that he was entitled to a conveyance of an undivided moiety of "The Valley of Owen," yet it does not appear to us that he has any ground to stand upon in Chancery, or on which to erect a claim upon the appellant to do more than he has already done.

He admits that he has received from the appellant, a deed which he brings into Court, but demands of him to execute another, and calls on the Chancellor to enforce that demand. We have examined the copy of that deed exhibited with the bill, and are unable to discover in what it either is, or can be supposed to be, defective, either in form or substance, or as respects the name, or description of the land, but think it a good and valid deed to pass to the complainant in fee simple, all the right, title and interest of the appellant, in, and to one undivided moiety of the tract of land called "The Valley of Owen."

429 * The counsel for the complainant have not suggested a defect, nor told us in what it was supposed to be deficient, and it is only from what fell in argument from the counsel for the appellant that we learn there was some imaginary inaccuracy in the description given in the deed, which we have not been able to detect. It is described as being one undivided moiety of a tract of land called "The Valley of Owen," which had before been conveyed to the President and Directors of the Mechanics Bank of Baltimore, by the name of "Glen Owen," that is, which undivided moiety of "The Valley of Owen," had been conveyed by the name of "Glen Owen," which is a clear and perfect description of it, as one undivided moiety of "The Valley of Owen." The complainant required no further deed, and the going into Chancery to compel the defendant to make another was a vexatious and unnecessary proceeding, and the bill ought to have been dismissed. The contract had been fulfilled, and it was unreasonable to drag the party into Chancery, to subject him to a decree to do what he had already done.

There should be some end to litigation, and Chancery should not be resorted to for the purpose of unnecessarily harassing and subjecting a party to costs and charges, who has done all that he can

properly be called on to do. The probability is, that the attention of the Chancellor was not called to the deed which had been given, but that he was left to suppose it was defective, and that another was necessary to the fulfilment of the contract, or looking to that deed, and seeing that it was not defective, but a good and sufficient conveyance in fee, to the complainant, of all the right and title of the appellant, to one undivided moiety of "The Valley of Owen," he would not, we presume, have entertained the bill. Bill dismissed with costs.

Decree reversed.

* KARTHAUS vs. OWINGS—June, 1830.

430

K. sued out a writ of replevin, gave the usual bond, and the sheriff replevied the goods demanded. Judgment being rendered against him, he appealed and filed the usual appeal bond conditioned to prosecute his appeal with effect, and satisfy the damages and costs awarded by the county and Appellate Courts. Judgment was rendered against him upon the appeal. In an action upon his appeal bond the following questions were decided:

1. That a replication assigning as a breach "that the defendant did not prosecute his appeal with effect to the damage of the plaintiff, &c." was sufficient upon general demurrer, and was an answer to a plea of general performance, and to a plea "that the defendant did prosecute his appeal with effect." (a)
2. That a plea in bar "that the appellant paid the debt, damages and costs adjudged by the County Court, and all costs and damages that were awarded by the Appellate Court," is defective upon general demurrer, being no answer to the judgment for a return of property and costs.
3. That a plea in bar "that the replevin bond was, after the recovery in the Appellate Court, and before the institution of this action, sued against B. (the surety of K. therein) to judgment, and that B. satisfied the plaintiff for that judgment," is also defective upon general demurrer. The costs of the Appellate Court are not paid by such satisfaction, nor does the plea show that the judgment of the County Court was satisfied before this action was brought.
4. That the plaintiff might give in evidence the value of the goods replevied; the record of the replevin was proper evidence to identify them, and the appraisement made in such cases was *prima facie* evidence of their value.
5. That the plaintiff's right to recover interest on the value of the goods replevied and costs of the replevin, was a question exclusively for the jury, and that the bills of exceptions taken and signed in the action of replevin, could not be read to the jury to show that interest ought not to be allowed. (b)

(a) Approved in *Burgess vs. Lloyd*, 7 Md. 195-198; *Tucker vs. State*, 11 Md. 329; *Le Strange vs. State*, 58 Md. 40; *Gorman vs. Lenox*, 15 Peters, 45. See *Karthauss vs. Owings*, 6 H. & J. 111.

(b) Distinguished in *Comegys vs. State*, 10 G. & J. 187. Approved in *Railway Co. vs. Sewell*, 87 Md. 452. See *Newson vs. Douglass*, 7 H. & J. 807, and cases in note (b).

6. That the record of the judgment against B. the surety, and the execution thereupon issued, returned "*cept*," "*staid by injunction*," is not evidence to show that the plaintiff had been satisfied that judgment, or that the amount thereof ought to be allowed by the jury in the assessment of damages.

The sound legal construction of the condition of an appeal bond, is, that it is an undertaking to reverse the decision appealed from, or satisfy the judgment of the Appellate Court. (c)

Where a plea contains matters of fact, as well as matters of record, it should not conclude with a verification by the record, but with a verification to the country. (d)

A plea in bar must be a substantial and conclusive answer to the action. (e)

431 * The appraisers authorized in the case of rent by the Statute Geo. 2, have in practice been resorted to in all cases of replevin in this State, for the purpose of ascertaining the value of the goods replevied; their appraisement is *prima facie* evidence of the value of goods taken.

APPEAL from Baltimore County Court. This was an action of debt, on an appeal bond, dated May 2d, 1809, executed by the appellant, Peter A. Karthaus, on an appeal from a judgment in favor of the appellee, James Owings, as plaintiff in a replevin suit in Baltimore County Court. The condition of the bond is as follows: "Whereas the said James Owings did obtain judgment against the said Peter A. Karthaus in Baltimore County Court, in March Term, 1809, and said P. A. K. is about to appeal from said judgment, so as aforesaid rendered, returnable to the next Court of Appeals. Now the condition of the above obligation is such, that if the said P. A. K. shall not pursue the directions of the Act of Assembly, entitled, 'An Act for regulating writs of error, and granting appeals to and from the Courts of common law within this Province,' at the next ensuing Court of Appeals, which shall be held for the Western Shore of the State of Maryland, and prosecute the same writ with effect, and also satisfy and pay to the said J. O. his executors, administrators and assigns, in case the said judgment shall be affirmed, as well all and singular, the debt, damages and costs, adjudged by the County Court aforesaid, as also all costs and damages that shall be awarded by the Court of Appeals aforesaid, then the said bond to be and remain in full force and virtue, otherwise of no effect."

The appellant, Karthaus, pleaded the following pleas, after cravingoyer of the bond.

1. Performance generally of the condition of the bond.

(c) See *Karthaus vs. Owings*, 6 H. & J. 111.

(d) Approved in *Shafer vs. Stonebraker*, 4 G. & J. 354.

(e) Approved in *Coal Co. vs. Shannon*, 34 Md. 154; *Willing vs. Bozman*, 52 Md. 62. No rule of pleading is better settled than that a plea in bar must answer the whole declaration. If the plea undertake to answer the whole, but in fact answer a part only, then the plea is bad and the plaintiff may demur. *Ibid*.

2. That he did pursue the directions of the Act of Assembly, entitled, "An Act for regulating writs of error, and granting appeals, &c." and did prosecute the appeal with effect.

* 3. That he pursued the directions of "the Act, &c." at the "ensuing Court of Appeals, as meant and mentioned in **432** the condition of the bond," and paid the debt, damages and costs, adjudged by the County Court, and also all costs and damages that were awarded by the Court of Appeals.

4. After setting out the execution of the replevin bond, with one Charles L. Boehme as surety, and the recovery in replevin in the County Court and the Court of Appeals, he pleaded—that the replevin bond was, after the recovery in the Court of Appeals, and before the institution of this action, sued against Boehme to judgment, and that Boehme satisfied the appellee the judgment.

5. After reciting the recoveries in replevin, as in the last plea, he pleaded that the replevin bond was sued to judgment by the appellee against Boehme, that a *ca. sa.* was issued on the judgment, that Boehme was taken under the *ca. sa.* and by the appellee and the sheriff was discharged from the execution.

6. After the recitals as to the replevin bond, and recoveries in replevin, as in the last pleas, he pleaded that after the recovery in the Court of Appeals, and before this suit was brought, the replevin bond was sued to judgment against Karthaus; that Karthaus appealed from the judgment—that his appeal was dismissed, and he was adjudged to pay costs, which he did pay accordingly.

To these pleas the appellee replied as follows:

To the first plea—that the appellant did not prosecute with effect his appeal from the judgment of Baltimore County Court. And he then assigned the following breaches.

1. That the appellant did not prosecute the appeal with effect.

2. That the judgment of Baltimore County Court was affirmed and ratified by the Court of Appeals, by whom it was also adjudged that the appellee "should have a return of the said goods and chattels, to be detained by him * irreplevisable forever;" and also, that costs and charges, &c. should be recovered against the **433** appellant.

To the second plea, "that the appellant did not prosecute his appeal with effect, as alleged by him in his plea."

To the third, fourth, fifth and sixth pleas, the appellee demurred, the appellant joined in these demurrers; and demurred to the replications to the first and second pleas.

The Court [ARCHER, C. J.] having given judgment against appellant on the demurrers, a writ of inquiry at bar was executed for assessing the appellee's damages. In the course of the inquisition the following exceptions were taken by the appellant:

1. The appellee offered evidence to prove the value of the goods replevied; but the appellant objected to the admission of the evidence, and the Court [ARCHER, C. J.] admitting it, he excepted.

tion of * the other. One of the conditions is, that the appellant shall prosecute with effect; that is to a successful termination of the appeal, and therefore the plea of payment, admits that he has not prosecuted with effect—the conditions being inconsistent, the plea of general performance is not good. *Steven's Plea*. 369. Such a plea is not good, where the condition is in the alternative. *Ib.* 369; 2 *Saund.* 410, note (3); 2 *Chitty's Plea*. 529, note. But the breaches are well assigned, it being sufficient to negative the words of the covenant. *Marston vs. Hobbs*, 2 *Mass. Rep.* 437; 1 *Chitty's Plea*. 326. The covenant here is, that he will prosecute with effect, and the replication avers, that he did not prosecute with effect, which is in conformity with the decision in *Karthauss vs. Owings*, 6 *H. & J.* 134. If payment of the damages, &c. is a discharge, it should have been pleaded by the other side. *Ferguson vs. Cappeau*, 6 *H. & J.* 394; 1 *Chitty's Plead.* 298. If there is one good breach, it is immaterial what may be thought of the others, as upon the demurrer the final judgment must be for the plaintiff, if a declaration containing a good count, is demurred to, the plaintiff is entitled to judgment. *Wall vs. Wall*, 2 *H. & G.* 79. They also cited 2 *Chitty's Plead.* 619, 620, 621, 622; 3 *Ib.* 290; 3 *Chitty Black.* 327, (note;) *Brickwood vs. Anniss*, 5 *Taunt.* 614; 3 *East Rep.* 250; * Act 1799, ch. 86, sec. 1; *Scott vs. Dorsey*, 1 *H. & J.* 233; *Newson vs. Douglass*, 7 *H. & J.* 453; 1 *Bac. Abr.* 528; *Cro. Chas.* 440, 445; 2 *Bac. Abr.* 719.

STEPHEN, J. delivered the opinion of the Court. This suit was instituted on an appeal bond, on an appeal from a judgment of Baltimore County Court, rendered in favor of the appellee, against the appellant. In the course of the argument various questions were raised, and pressed with considerable zeal and energy; some of which are not free from difficulty: but one of the points on which the counsel of the appellant seemed mainly to rely, has already been solemnly adjudicated by this Court, and ought not now to receive a different decision, unless that adjudication was manifestly founded upon untenable and erroneous principles. To this action the defendant pleaded, First, the plea of performance generally. And here the Judge referred to the pleadings—Bills of exceptions and judgment of the County Court, as before set out, and then proceeded.—Was the judgment of the Court below correct in overruling the defendant's demurrer to the replication to the first plea? We think it was. It is not necessary to decide whether the plea of general performance was properly pleaded in the present case, or whether, if it was not, advantage could be taken of it by a general demurrer, or whether its ambiguity, with reference to the stipulations contained in the condition of the bond, was cured by the breach assigned in the plaintiff's replication; because it has been adjudged by this Court in *Karthauss*

vs. *Owings*, * 6 *H. & J.* 134, that such breach was properly assigned, and the defendant's demurrer admitting the facts 441 therein stated to be true, the plaintiff of course was entitled to judgment, according to the established principles of pleading. Independently of the weight justly due to a former decision of this Court, we think the breach was properly assigned by a negative averment that he had not, in the language of the condition of the bond, "prosecuted his suit with effect." In assigning breaches the general rule is, that they may be assigned, by negating the words of the covenant. The exception to this rule is, that when such general assignment does not necessarily amount to a breach; the breach must be specially assigned. 1 *Esp. N. P.* 158; 2 *Mass. T. Rep.* 433; 1 *Wheat. Selwyn*, 416, are to the same effect. The covenant of seisin and of right to convey come within the rule. The covenants against incumbrances, and for quiet enjoyment, come within the exception, for the defendant does not covenant against all interruptions of the plaintiff's possession, nor against all possible incumbrances. To these covenants, the breaches should be specially assigned, shewing the nature of the incumbrance, and interruption complained of. The covenant of warranty also comes within the exception: for the defendant is not bound, by his general warranty, to warrant against all claims and ousters, and the plaintiff must assign a breach, by shewing an ouster by an elder or paramount title. "It is not necessary to state matter which would come more properly from the other side." The meaning of this rule is, that it is not necessary to anticipate the answer of the adversary: which according to Hale, C. J. is "like leaping before one comes to the stile." It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet urged. *Step. on Plea.* 354. As strongly and strikingly illustrative of the principle there laid down, he refers to a case decided in 1 *Term Rep.* 638, where there was a covenant in a charter party "that no claim should be * admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's 442 arrival on a survey to be taken by four shipwrights, to be indifferently chosen by both parties;" and in an action of covenant brought to recover for short tonnage, the plaintiff had a verdict; the defendant moved in arrest of judgment, that it had not been averred in the declaration, that a survey was taken and short tonnage made to appear. But the Court held that if such survey had not been taken, that was matter of defence which ought to have been shown by the defendants; and refused to arrest the judgment; and Ashhurst, Justice, in delivering the opinion of the Court, lays down the following principle: "that where a right of action is once vested, any circumstance, the omission of which goes to defeat it, whether called by the name of a proviso by the way of defeasance, or a condition subsequent, must in its nature be a matter of defence, and ought to be

shewn by the defendants: and all that is necessary *prima facie* to found an action of covenant upon, is, that the covenant should be broken." In the case of *Ferguson vs. Cappeau*, 6 H. & J. 401, the same rule is sanctioned and established. This Court there say, "It is a settled rule in pleading, that in an action founded upon a contract, if there be in the contract a proviso or condition, which operates only in defeasance of it, or merely respects the liquidation of damages, after a right to them has arisen by a breach of the contract, it is not necessary to be stated in the declaration, but should come from the other side; but that if there be a condition precedent, or a proviso or other matter, which qualified the contract, or goes in discharge of the liability of the defendant, it must be stated." Upon failing to prosecute his suit with effect or to a successful termination, or in other words upon the affirmation of the judgment of the Court below by the Court of Appeals, the event occurred, by which the condition of his bond became broken, and he could only be discharged from his liability, by performing the alternative stipulation, in satisfying * the judgment pronounced by the Court of Appeals, this being matter which operated in defeasance of his responsibility, ought to have been pleaded by the appellant; for the sound legal construction of the condition of the appeal bond, was an undertaking to reverse the decision of the County Court, or satisfy the judgment of the Court of Appeals; and as the Court decided in 1 *Term Rep.* 638, above referred to, that a right of action vested in the plaintiff from the defendants not having fully laden the ship before she left India, which they were bound by the covenant to do, and that all that is necessary *prima facie* to found an action of covenant upon, is that the covenant should be broken, (and the principle is here equally operative,) so here we consider that a right of action vested in the appellee, when the appellant failed to prosecute his suit with effect, which by the condition of his bond he explicitly bound himself to do; from which right of action if he wished to discharge himself, it was his duty to have pleaded by way of defence that he had satisfied the judgment rendered by the Court of Appeals. We are therefore of opinion that the breach was well assigned by the averment that the appellant "did not prosecute his suit with effect," to the damage of the plaintiff as there stated, and that the replication, concluding as it did, was right; for where a plea contains matter of fact as well as matter of record, it should not conclude with a verification by the record, but with a verification to the country. 2 *Saun. Plea. and Evid.* 315; 3 *Mod.* 79, there referred to—Upon the appellant's demurrer to the replications of the appellee, to the appellant's first and second pleas, we therefore think the judgment of the Court below was correct.

As to the third, fourth, fifth and sixth pleas of the appellant, to which the appellee demurred; and the appellant joined in demurrer. The principles of sound logic constituting the basis of the science of

pleading, a plea in bar must be a substantial and conclusive answer to the action. *Step. on Plea.* 71. This Court are of opinion that the third * plea of the appellant is defective, because it should shew a compliance with the judgment of the Court of Appeals: **444** every word of the plea may be true and yet the condition of the bond be broken; the plea that he had paid the debt, damages and costs adjudged by the County Court, and also all costs and damages that were awarded by the Court of Appeals, is not a sufficient answer to the judgment of the Court of Appeals, which is for a return of property and costs. He should have set out the judgment of the Appellate Court, and then pleaded satisfaction of it, in order to discharge himself. That the appeal bonds covers a case of replevin is no longer an open question, and if it was, the defence of the appellant must present a conclusive answer to the claim of the appellee, which is for a return of the property and costs.

The fourth plea we consider is likewise defective. The satisfaction of a judgment recovered, in a suit upon the replevin bond against the surety of the appellant, would be no bar to a suit upon the appeal bond, because the judgment in the County Court, is not co-extensive with the judgment in the Court of Appeals; the costs in the Court of Appeals at all events are not covered by it. And the plea moreover does not state that the judgment of the County Court was satisfied before this suit was brought, which was an essential averment to constitute a legal and valid plea in bar.

The fifth plea is equally, if not more defective than the first; certainly the technical satisfaction there pleaded would not be a bar to this suit, if the satisfaction pleaded in the former plea would not; besides an entry of the execution "not called by consent," is perfectly consistent with the facts contained in the plea, which, as we have seen, must be a substantive and conclusive answer to the action.

The sixth plea is still more feeble, ineffective, and unavailing than the others, with which it stands associated. It is, that judgment was obtained against him in * a suit upon the replevin bond, from which he appealed to the Court of Appeals; that his **445** appeal was dismissed, and he was adjudged to pay costs, which he did pay accordingly. He admits in express terms that he did not prosecute his suit with effect, and the payment of costs, clearly was no bar to this suit.

In the execution of a writ of inquiry at bar for the purpose of assessing the damages of the appellee, (the judgment of the County Court on the demurrers being against the appellant) five exceptions were taken by the appellant. As to the first exception, we think the evidence admitted by the Court below was properly received, as it was adduced to prove the value of the goods replevied. The decision of this Court in 6 *H. & J.* 134, clearly settles this question. That case shews, that you may recover the value of the property upon the

affirmance of the judgment, by pleading that the suit was not prosecuted with effect. The opinion of the Court below, expressed in the second exception, was not erroneous, because the records were proper evidence to identify the goods replevied. The appraisers, in the case of rent, are authorized by a statute passed in the reign of George 2d, 6 *Bacon's Abr.* 60, and have in practice been resorted to in all cases of replevin in this State, for the purpose of ascertaining the value of the goods replevied, in order as directed by that statute in the case of rent, to ascertain the sum in which the replevin bond is to be taken. This Court are therefore of opinion, that the appraisement was at least *prima facie* evidence of the value of the goods, at the time of the replevin, and was legally admissible in evidence for the establishment of that fact. The opinion of the Court we also think correct as stated in the third exception, in which they refused to exercise a controlling power and jurisdiction over the jury upon the subject of interest, to whom, in such a case, the power of granting it exclusively belongs according to the decision of this Court in the case of *Newson and Douglass*, 7 H. & J. 453. We do not
446 * think that the Court erred in the opinion expressed in the fourth exception, because the statements and evidence contained in the exceptions in the replevin suit were clearly not admissible, or legal evidence, to influence the jury in the allowance of interest. If the witnesses were living, they ought to have been produced. *Bowie vs. O'Neal*, 5 H. & J. 231. Even proof of their testimony on the first trial, in case of their deaths, is only admissible upon the ground of necessity, no evidence that they were dead was offered in this case.

We are also of opinion that the Court were clearly right in the opinion given in the fifth exception. The discharge of the defendant by injunction, without the assent of the creditor, was clearly no satisfaction of his claim; we are therefore of opinion that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

SPRIGG vs. LYLES AND WIFE, and RICHARD LYLES.—*Cross-Appeals*.—June, 1830.

A mortgage omitted to be recorded in due season from no fraudulent design, will, under the Act of 1785, ch. 72, sec. 11, be decreed to be recorded, saving the rights of subsequent purchasers without notice of its existence; and upon a bill filed by the mortgagee, a sale of the mortgagor's interest at the time of its execution, will also be decreed with a like saving. (a)

(a) Cited in *Dyson vs. Simmons*, 48 Md. 219. See *Hampson vs. Edelen*, 2 H. & J. 55, note; *Alexander vs. Ghiselin*, 5 Gill, 188; *Nelson vs. Bank*, 27 Md. 51. As to jurisdiction of equity to remedy omission to record deeds. see Rev. Code, Art. 65, s. 102; *Wickes vs. Chew*, 4 H. & J. 442, note.

A mortgagee solicited a third party to purchase land, mentioned in his unrecorded mortgage, at sheriff's sale, under a judgment against the mortgagor, obtained after its execution, and for which, in fact, the mortgagee was responsible as surety. At the sale, notice of the mortgage was publicly given. The object was to obtain the land at a low price for the mortgagor and his family; but the scheme being defeated, and the party solicited having given full value for the land, such mortgage cannot be recorded without saving his rights.

Where the security which an unrecorded mortgage gives to a debt, has been abandoned for other security given by the debtor, and accepted by the creditor, such mortgage will not be decreed to be recorded.

* APPEAL from Montgomery County Court, as a Court of Equity. The bill filed on the 16th of October, 1823, by John Sprigg against Robert Lyles and Juliet his wife, and Richard Lyles, stated, that the said Robert, being indebted to the complainant, in the sum of \$2,000, with interest from 21st July, 1817, for the purchase money of several tracts or parcels of land, sold by the complainant to the said Robert, executed, together with his said wife Juliet, a mortgage of said lands to complainant, on the 3d December, 1819, for the purpose of securing the payment of the same, the complainant having conveyed the lands so sold to the said Robert, to his said wife Juliet, at his the said Robert's request. The bill further charges that the mortgage so as aforesaid executed by Lyles and wife to complainant, was not recorded within the time required by law, which omission to record, was the effect of accident, and not the result of any fraudulent design, upon any one whatsoever. It is also alleged that some time in the year 1822, the interest of the said Robert Lyles, in the said lands, was sold by the sheriff of Montgomery County, in virtue of several writs of *fiери facias*, issued upon judgments rendered by Montgomery County Court against the said Robert, which judgments were upon contracts, or agreements, of the said Robert, made, and entered into, before the date of the before mentioned mortgage to complainant. That at the sale so made by the sheriff, the defendant Richard Lyles, became the purchaser, though he, as well as other persons present, were expressly notified on the day of sale, and before the sale, of the existence of the mortgage to the complainant, and that the debt thereby intended to be secured was unsatisfied—the complainant therefore charges and avers, that the said Richard, bought with notice, that the purchase money for said lands was then due. The bill prayed that the defendant, Robert Lyles, may be decreed to pay the said purchase money with interest, by a certain day, and in default thereof, that the lands in the mortgage contained may be sold, for the payment of the same, that said deed of mortgage may be admitted to record, and for further relief. 447 448

Exhibit A, is a copy of the mortgage from Lyles and wife, to complainant, executed and acknowledged on the 3d of December, 1819.

The answer of Richard Lyles states, that he became the purchaser of the lands in the mortgage contained, at a sale made of the same, by the sheriff of the county, as alleged in the bill, and that he has paid the said sheriff the purchase money. That prior to the sale, the complainant advised this defendant, to become the purchaser of said lands, stating, at the same time, that a certain Leonard Hays, would probably bid them up to a high price, but that he, the said Sprigg, would prevent him doing so, by apprising him of the existence of his mortgage on the property. That defendant objected to buying the said property, and remarked to the complainant, that at some future time, he might attempt to charge the same with his mortgage debt; which the said complainant then said, he never would do, and could not if such were his desire. That said mortgage was of no avail, and that it had been discharged by an assignment by Robert Lyles, to him, of bonds due from Otho Sprigg, of Frederick County. That confiding in the statements so made to him by the complainant, this defendant purchased the lands as before mentioned, which he would not under other circumstances have done. The defendant further states, that a portion of the money due on the bonds of Otho Sprigg, assigned as before mentioned, has been paid to the complainant, and that the balance is secured by a lien on valuable real estate in Frederick County. He admits that the judgments on which the first writs of *fi. fa.* issued may have been obtained, on contracts entered into by the said Robert Lyles, prior to the date of the paper filed by the complainant, purporting to be a mortgage.

449 *The answer of Robert Lyles and wife, admits the debt from the said Robert to complainant, as charged in the bill, to secure the payment of which, they allege, that the said Robert agreed to assign to complainant, the three several single bills of a certain Otho Sprigg, of Frederick County, which single bills, were given on account of the purchase money of a valuable real estate in said county, upon which they were liens. That the complainant agreed to accept the said assignments as the only security for the debt, due by the said Robert to him. The defendant Robert, states, that the complainant requested him, not actually to execute the assignments, but to permit the bills still to appear as his property, alleging as a reason therefor, that the said Otho, (who was his brother-in-law,) would in that case, pay them more promptly than if they were actually assigned to him. That on the 3d December, 1819, the said Robert, and complainant, being then about to set out for the western country, the said mortgage was executed, to guard against death or accident during their absence, and to show the balance due, and for no other purpose. That in the year 1821 the defendant, Robert, finding his circumstances much embarrassed, and that he might be compelled to apply for the benefit of the insolvent laws, informed the complainant thereof, and that the assignment of the bonds of Otho Sprigg, theretofore agreed on, must then be executed,

or that in the event of his petitioning, he should be compelled to return them, as a part of his effects; upon which the complainant agreed to accept the assignments, and they were accordingly executed, and the bills delivered to him.

The defendants further state, that complainant has received about one hundred dollars, on account of said single bills. They admit that judgments were rendered against the defendant, Robert, in Montgomery County Court, as alleged by complainant, and that writs of *fi. fa.* issued as stated; and they believe they were rendered on contracts made prior to the date of the pretended mortgage to complainant. They deny that the omission to record said mortgage was the * result of accident, as averred by the complainant, who, they affirm, knew perfectly well that recording was essential to its validity. They further say, that the single bills assigned the complainant as before mentioned, are now in suit in Frederick County Court for his use. 450

A commission issued, under which, the execution of the deed from the complainant to the defendant, Juliet Lyles, and the mortgage from Lyles and wife to complainant, as alleged in the bill, were duly proved by the magistrates before whom the same were acknowledged. It was also proved by the then deputy sheriff of Montgomery County, that on the 25th of September, 1822, he made sale of the lands in the mortgage mentioned, under writs of *venditioni exponas*, against the said Robert Lyles, after due and legal notice thereof, and that Richard Lyles, one of the defendants, became the purchaser of the same. That on the day of sale, and while the sale was proceeding, the complainant gave notice to the bidders, and others present, that he had a mortgage on the land, amounting, principal and interest, to about \$2,400 or \$2,500. That Leonard Hays, who was present, stated, that he had understood that complainant had a mortgage on the land in dispute, but not for so large an amount as he had stated; upon which Richard Lyles mentioned, that he had always understood complainant's mortgage was for as much as \$2,000. It was proved on the part of the defendants, that \$100 had been paid to complainant in August, 1819, on account of Otho Sprigg's notes, assigned him by the defendant Robert Lyles. It was further proved, that the complainant, upon being informed by the deputy sheriff who made the sale, that he had writs of *capias ad satisfaciendum* against Robert Lyles, told him, the said deputy, that he would rather he should get *fi. fa.*'s, because he, the complainant, was security for said Robert, and would show the sheriff his property at any time. There was proof of some conversations between the complainant and Richard Lyles, in which the complainant apprised the said Richard, that one Hays would probably buy the land, and in that event, Robert Lyles would be * turned out of his house. This, the complainant said, he was determined to prevent, and for that purpose declared, that he would let it be understood that he had a lien on it, 451

which Hays would believe, if he, Richard, would not contradict it. It was proved that the single bills of Otho Sprigg, the assignment of which to complainant, by Robert Lyles was proved, amounted together to three thousand dollars, with interest from the 15th October, 1818. There was no evidence to show the precise understanding of the parties at the time of the assignment, whether they were received as a payment of the debt due from Robert to complainant, or merely as collateral security, but subsequently, complainant was proved to have said that they were taken as collateral security for the mortgage, and in part to indemnify the complainant against some responsibilities he had assumed for the said Robert. It was in evidence that these single bills were given by Otho Sprigg for the share of Lyles and wife, in some real estate in Frederick County.

The County Court, (KILGOUR and WILKINSON, A. J.) at March Term, 1828, passed the following decree:

This cause being ready for decision, the proceedings were carefully read and considered. It is thereupon, this 18th day of April, 1828, decreed by Montgomery County Court, as a Court of equity, that the deed of mortgage mentioned in the complainant's bill, from the defendants Robert Lyles and Juliet Lyles, dated, and executed on the 3d day of December, 1819, be recorded among the land records of Montgomery County, provided always, that such deed shall not destroy, or in any manner affect, any title that Richard Lyles may have acquired, as purchaser of said premises, at the sheriff's sale mentioned in the proceedings, or the title of any other purchaser of the premises, in case of a purchase, made after the date of the deed aforesaid, and without notice of such deed by the person making such after-purchase, whether such purchase be by contract, or by deed, recorded agreeably to law, nor shall such deed, though recorded

452 as aforesaid, in any manner * affect the creditors of the party making such deed, who may have trusted such party after the date of said deed. And it is further decreed, as aforesaid, that the complainant's bill of complaint be dismissed, as against Richard Lyles, one of the defendants in this cause; and that unless the defendants Robert Lyles and Juliet Lyles, on or before the 29th May, 1828, pay to the complainant, or bring into this Court to be paid to him, the sum of \$3,280, with interest, &c., all the right, title, interest and estate of Juliet Lyles and Robert Lyles, to the property in the proceeding mentioned, shall be sold, for the payment of the same, &c.

From this decree, the complainant, and Robert Lyles and wife appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Forrest and Magruder, for the appellant, John Sprigg,

453 * referred to the Acts of 1785, ch. 72, sec. 11; 1792, ch. 41, sec. 3;

Bowie vs. The State, 7 H. & J. 33; *Pannel and Smith vs. The Farmers Bank*, 7 H. & J. 202.

Key, for the appellee. At the time these judgments were obtained nothing was known of the mortgage. The liens created by them, are therefore unaffected by it. Suppose, instead of judgments, they had taken mortgages, and had them recorded in time, and without knowledge of the mortgage to complainant, would theirs not have overreached his? The mere delivery to them of the title papers would have been sufficient. *Sugden Vendors*, 366.

The mortgage to complainant cannot be set up as against Juliet Lyles. The Act of Assembly requires, that the Court shall be satisfied that the mortgagee, who asks to have his mortgage recorded, has a fair equitable title to the premises. The bill, to be sure, asserts this title, but the answers deny it, and affirm that Otho Sprigg's notes were received by the complainant, in lieu of any other security. These notes were preferable to the mortgage, being an equitable * lien on a valuable real estate. By taking a security of this description, the vendor destroys his lien. 4 *Wheat*. 255. **454**

EARLE, J. delivered the opinion of the Court. The record of this case has been attentively examined, and we are unable to discover therein, any particular, in which the equity jurisdiction of Montgomery County Court has erred. The disputed land in this cause was sold in 1817, and almost three years elapsed before the seller took from the purchaser, so much as a bond for his purchase money, and he seemed satisfied with no other security for it, than what the land sold of itself afforded. On the 3d December, 1819, he conveyed the land to the wife of the purchaser, and at the same time received from him obligations for his money, secured by a mortgage of the husband and wife, and made payable, with interest, in three equal annual payments. This mortgage deed was not recorded within due time, but the omission to record appears to have happened without any fraudulent design, or intention of the party, and such intention is no where in the proceedings imputed to him. It ought then, we think, to be decreed to be recorded, unless the security it gives to the debt has been abandoned for other security given by the purchaser, and accepted by the seller. This has been strenuously urged upon us, but we cannot perceive in the subsequent transactions between the parties, the smallest appearance of an abandonment. Otho Sprigg's paper to a larger amount was assigned in December, 1821, with a formal guaranty of the payment of it. It was, however, the guaranty of an insolvent man, and the assignment was unaccompanied by any understanding that this security was to be alone relied upon. The circumstances seem to exclude the idea that it could have been so relied upon. Otho * Sprigg had failed in 1820, and the mortgage by which the assigned paper was secured, proved to be **455** defectively acknowledged; and it was uncertain whether other cred-

itors had not preferences over the equitable lien on the mortgaged premises. In this state of things it would have been most unwise to give up any other security for this, and the inference cannot be made, without stronger facts to justify it than are here presented to us. We are therefore of opinion, that the Court below were right, in decreeing the mortgage from Robert Lyles and wife to be recorded, and a sale under the mortgage for the payment of the mortgage money. We also approve of the decree to dismiss the complainant's bill as against Richard Lyles. This part of the case rests upon different grounds from the former. The object of the parties appears to have been to secure a home for Robert Lyles, and perhaps too much zeal, and some indiscretion were manifested by them in endeavoring to attain it by the means used to prevent Leonard Hays from bidding for the life estate. The scheme, however, did not take, and Richard Lyles was made to pay the full value of it; and it is certain he became the purchaser, with the approbation, if not at the instance, of John Sprigg, who was relieved by the purchase from the payment of a large sum of money for Robert Lyles, for whom he was security.

Decree affirmed.

TURNER *vs.* PLOWDEN, Adm'r of LLEWELLIN.—June, 1830.

An action instituted by L. upon a single bill payable to "L. executor of B." is an action in his own right, to which a debt due from him may be pleaded, and proved as a set-off; and he cannot go into evidence of the consideration of the bill, to shew that it was given for a debt due B. in order to exclude the set-off as due in another right. (a)

456 * APPEAL from Saint Mary's County Court. This was an action of debt, instituted July 5th, 1825, by John Llewellyn, in his life-time, against Josiah Turner the appellant, and Henry Turner (whose death was suggested while the cause was depending) on the following single bill signed by them.

"\$203.75, on the 20th day of June, next, we promise to pay to John Llewellyn, executor of Jeremiah Boothe, his heirs or assigns, or order, two hundred and three dollars and seventy-five cents, with interest from date, &c. for value received. January 25th, 1825."

Before the case was tried in the County Court, Llewellyn died, when his administrator, William H. Plowden, the present appellee, appeared and became a party to the cause.

The defendant pleaded payment, and an account in bar for rent due from Llewellyn, the intestate of the appellee; issues were joined upon these pleas.

(a) Cited in *Graham vs. Fahnestock*. 5 Gill, 216. Cf. *Curtis vs. Bank*. 7 H. & J. 20.

1. At the trial, the defendant offered to read in evidence, the receipt of William H. Plowden to him for \$200, dated February 16th, 1827, to which the plaintiff objected, and the Court [PLATER, A. J.] sustained the objection. The plaintiff then offered evidence to prove, that the note on which the action was founded, was given for property belonging to the estate of Jeremiah Boothe, and sold by the said John Llewellyn as his executor. The defendant objected to the admissibility of this proof, but the Court [PLATER, A. J.] overruled the objection, and permitted it to go to the jury. The plaintiff then prayed the Court to instruct the jury, that if from the evidence in this cause they should be of the opinion that the rent charged in the account in bar was due from John Llewellyn to the defendant, in his individual right, and not as executor, that then the defendant is not entitled to be credited with it in this action. The Court [PLATER, A. J.] gave the instruction as prayed, and the defendant excepted.

The verdict and judgment being for the plaintiff, the defendant appealed to the Court of Appeals.

*The cause was submitted on notes by the appellant to
BUCHANAN, C. J., EARLE and MARTIN, JJ.

457

Stonestreet, for the appellant.

No counsel appeared for the appellee.

MARTIN, J. delivered the opinion of the Court. The judgment in this case is reversed. The testimony offered by the plaintiff to prove the consideration of the bill, under seal, was not legal and proper evidence to go to the jury, and ought to have been rejected by the Court.

This action was instituted by Llewellyn, in his own right, and not in his capacity of executor of Boothe, and if the rent charged in the account in bar, was due from him, as a debt of his own, and not in his representative character, it was a legal set-off in this suit.

The error of the Court below appears to have proceeded from a misconception of the nature of this action. The debt to be set-off, must be due in the same right with that claimed. If, as they supposed, Llewellyn sued as executor, their instruction would have been correct; but the claim being in his own right, the prayer of the plaintiff ought not to have prevailed.

Judgment reversed, and procedendo awarded.

458 * WELLS AND WIFE *vs.* BEALL, Adm'r of BRASHEARS.
June, 1830.

A devise to "A. and the heirs of his body, lawfully begotten," since the Act of 1786, constitutes an estate in fee-simple. A remainder, limited to take effect upon the determination of such an estate, is inoperative. (a) Rents and profits are recoverable in equity from those who take possession of a minor's real estate. (b)

It is not necessary, under the Act of 1825, ch. 117, to file exceptions to the auditor's report, to take advantage of objections in the Appellate Court, which the pleadings in the cause put in issue, and which do not depend upon the state of the accounts, though an account may be ultimately necessary to ascertain the extent of the claim. (c)

APPEAL from the Court of Chancery. In this case a bill was filed on the 10th December, 1825, by the appellee, Otho B. Beall, as administrator of Richard B. Brashears, against the appellants, William Wells, of George, and Jemima, his wife, and William Wells, executor of Jacob W. Brashears. It stated, that in the year 1797, a certain John W. Brashears, of Prince George's County, died, leaving five children, to wit: Jacob W., Richard W., Beall, Hester, and Jemima Brashears, having first duly executed his last will and testament, a copy of which is filed and exhibited with the bill. This will was proved June 17th, 1797. By it, he devised to his son, Jacob W., and the heirs of his body, lawfully begotten, his dwelling plantation, called Ledgworth, remainder to his sons Richard W. and Beall Brashears, and the heirs of their bodies, to be equally divided, with a reservation to his two daughters, of an equal right with the first devisee, Jacob W., until their death, or day of marriage. There was also a similar devise to Jacob W., of 44 acres, part of a tract called Plummer's Pleasure, with the like remainder, to Richard W. and Beall. The residue of the tract called Plummer's Pleasure, the testator devised equally to Richard W. and Beall, in fee tail general, with cross remainders in tail, to the survivor, and Jacob W. Brashears. The * testator then bequeaths a negro to each of his
459 said three sons, specifically; directs that his tobacco then on hand shall be disposed of by them for the purpose of paying his debts; divides among them equally the residue of his real and personal estate, and names them as his executors. The bill further states, that Beall Brashears died in the year 1801, without issue, and without changing the estate created in him by the aforesaid will.

(a) Approved in *Clarke vs. Smith*, 49 Md. 121. See *Newton vs. Griffith*, 1 H. & G. 77, note.

(b) Cited in *Laves vs. Lumpkin*, 18 Md. 340.

(c) Approved in *Anderson vs. Tuck*, 38 Md. 284. See Rev. Code. Art. 71, sec. 49.

That Richard W. Brashears died in 1806, intestate, leaving a widow and an infant son, Richard B. Brashears, (complainant's intestate.) That Hester died without issue in 1802, and that Jacob died in January, 1816, without issue, and without in any way altering the estate, which he took under the will of John W. Brashears. That in 1816, Jemima Brashears intermarried with William Wells, of George. The bill charges, that from the death of Richard W. Brashears, (the father of the complainant's intestate,) to the death of Jacob; the said Jacob held possession of, and received and retained to his own use, the proceeds of the whole of said lands, and that since his death, the same have been exclusively held, occupied and enjoyed by the appellants, William Wells of George, and Jemima his wife. That no part of said rents had been paid the complainant's intestate, in his life-time, or to his administrator since, but the whole amount is now due. That on the 4th of July, 1824, the complainant's intestate departed this life, a minor, and that administration on his estate has been duly granted complainant by the proper authority. Prayer, that William Wells, the executor of Jacob W. Brashears; may be decreed to account with, and pay complainant those portions of the profits of said lands, which accrued to his intestate during the life-time of the said Jacob; and that William Wells, of George, and Jemima his wife, may be compelled to account for those which have become due since; and for general relief.

The answer of Wells and wife, admits that John W. B. died about the period stated in the bill, having made his last * will and testament, of which the complainant's exhibit is a true copy; **460** and they refer to the same, for the purpose of ascertaining the true nature of the interests, and legal rights, which his children and devisees derived thereunder. The answer also admits that the testator left five children, as set forth in the bill, and that the particulars in relation to their several deaths, &c. are correctly stated; and it further admits, that complainant's intestate is the only son of Richard W., one of the sons of John W. B., and that he died an infant on the 4th July, 1824. The marriage of the appellants in 1816, is also admitted, and it is admitted that from the death of Richard W. B. in 1806, to the death of Jacob in 1816, all the lands mentioned in the will of John W. were held and enjoyed by Jacob, and that since the death of the latter, they have been held by these defendants. The answer then avers, that Jacob W. B. by a duly executed will, (a copy of which is exhibited and made a part of the answer, (devised the whole of his estate, to the defendant Jemima, and the heirs of her body, and they therefore allege, that they are lawfully in possession of all the estate and property which the said Jacob might legally dispose of, without responsibility to any one for the rents and profits thereof. They deny the title of John W. B. to the tract called Plummer's Pleasure, which they say was purchased, and paid for, by Jacob, out of his own funds, after the death of the former. They

admit that John, in his life, together with one Basil Beall, made a contract for the purchase of said tract, but insist that no part of the purchase money was paid by him, and therefore they positively deny any accountability for the rents, &c. of Plummer's Pleasure. With respect to any interest which the complainant's intestate may be supposed to have acquired in Ledgworth, upon the death of Jacob, they are not unwilling to pay a reasonable sum when the extent of that interest shall be ascertained. The answer further states, that no administration was had on the estate of John W. B. and therefore they cannot speak confidently of the value of his personal

461 * estate. They charge, however, as matter of belief, that the three slaves, of whom one was bequeathed to each of his three sons, Jacob, Richard and Beall, constituted the most valuable portion, and that consequently he could not have left assets sufficient to pay his debts, and the purchase money of Plummer's Pleasure. The three slaves were divided among the legatees, according to his will, and as Richard and Beall, thereby elected to take their legacies, rather than apply them to the extinguishment of the debt created for the land, they cannot now be heard to say that Jacob acted in his own wrong, in paying for the same out of his own funds, and taking the deed to himself. The Statute of Limitations was also insisted on as a defence.

The answer of William Wells, the executor of Jacob W. B. sets up, as a defence to the relief prayed against him, that he had fully and fairly administered the estate of his testator, and paid over the surplus to William Wells, of G. and Jenima his wife, agreeably to his said testator's will, long before he had any notice of the present claim. Upon proof of this, the bill was dismissed as to him with costs, without any opposition on the part of the complainant's solicitor.

A commission by consent then issued to take testimony, and the case was referred to the auditor to state an account of the rents and profits of the lands in the proceedings mentioned, from the depositions to be returned with the commission. Among other proof, the complainants offered a deed from William and Benjamin Beall to Jacob W. B. bearing date May 4th, 1802, which recited that Basil Beall and John W. B. had obtained a deed for Plummer's Pleasure, bearing date on the 31st of May, 1784, which deed being supposed to be defective, the parties, grantors therein, had conveyed the said land by a deed, dated March 18th, 1802, to the said William and Benjamin Beall, devisees of the aforesaid Basil, and it having been agreed between Basil and John W. B. that the said John W. B. should have 144 acres of said land, the said William and Benjamin,

462 as * devisees of Basil Beall, in consideration of said agreement, and of the sum of £315 16s. 4, paid them by the said Jacob W. B. conveyed to the said Jacob, devisee of the said John W. B. the said 144 acres, part of Plummer's Pleasure. The complainant

also proved, that Jacob W. B. had been heard to say, after the death of Richard W. B., that he held fifty acres of land to which Richard was entitled.

On the part of the defendants it was proved, that John W. B. in his life-time had acknowledged that he paid no part of the purchase money of the land purchased by him jointly with Basil Beall, and that the latter had paid the whole; and they proved that after the death of the said John W. the purchase money was paid by Jacob W. B. who took the deed to himself with the knowledge and consent of Richard.

There was a good deal of proof taken on both sides, in relation to the annual value of the lands, and number of acres, from which the auditor, in pursuance of the order of reference to him, stated several accounts.

Exceptions were filed to these accounts, upon the ground that the auditor had estimated the annual value too high, and had assumed that the lands contained a greater number of acres than was warranted by the proof.

BLAND, C. (December Term, 1827.) From the pleadings and proofs it appears, that early in the year 1784, the late John W. B. and the late Basil Beall, obtained a joint deed, by which the legal title in a tract of land called Plummer's Pleasure, was conveyed to them. That B. was then in possession of the part of that tract, held and claimed by him, containing 144 acres, and also of another tract called Ledgworth, containing 126 acres, and that he died so seized thereof, some short time previous to the 17th June, 1797, leaving five children, Jacob W., Richard W., Beall, Hester and Jemima. The late John W. B. by his will, devised the whole of Ledgworth, together with 44 acres of Plummer's Pleasure, to his son Jacob W. * in tail, reserving an equal usufructuary right with his son, to his two daughters, Hester and Jemima, in Ledgworth, until **463** their death or marriage; and on Jacob's dying without issue, the testator gave the 44 acres to his two sons, Richard W. and Beall, in tail, to whom he devised the remaining part of Plummer's Pleasure, in tail, with cross remainders to the survivor, and Jacob, in tail, in case of the death of either without issue. After which these devisees took and held under this will, and without any thing having been done by either of them to bar their respective estates tail. Beall Brashears died in the year 1801, without issue, and Hester B. died in the year following, also without issue, or having been married. Then Richard W. B. married Mary, and had issue, a son, Richard B. B. and died in the year 1806. After the death of John W. B. and prior to the month of May, 1802, Jacob W. took possession of that part of Plummer's Pleasure, which had been devised to him by his father, and after the death of his brother Richard W. he took possession of the whole of it; claiming it as his own, under a

deed of the 4th May, 1802, in which it is recited, that he was "the devisee of the aforesaid John;" alleging that he had in fact purchased, and paid for it; after which, in the month of January, 1816, Jacob died without issue, having previously by his will devised all his estate, real and personal, to his sister Jemima, the now defendant, who afterwards took possession of the whole of Ledgworth, and of Plummer's Pleasure, of which the late Jacob had been in possession; and in 1816 she married the now defendant, William Wells, of G. and they have ever since held, and do now hold possession thereof. Richard B. B. died an infant, on the 4th of July, 1824, without issue, and the complainant, as his administrator, on the 10th of December, 1825, filed this bill, for an account of rents and profits of so much of these lands as he was entitled to, during his life.

It clearly follows from this state of facts, that on the death of Beall

464 B. his brother Richard W. B. became *entitled, as tenant in tail, to three-fourths of so much of Plummer's Pleasure as had been so devised to them, which on his death, subject to his widow's dower, descended to his son Richard B. B. as tenant in tail, from which time his claim to rents and profits, arising out of so much of that tract as was withheld from him, commenced. Under the will of John W. B., Jacob, Hester, and Jemima were usufructuary tenants, in common of Ledgworth, Jacob for the one-half, and his two sisters, the other; and on the death of Hester, Jacob became entitled to take three-fourths, and Jemima one-fourth of the rents and profits of it. After the death of Jacob, without issue, Ledgworth, thus encumbered with Jemima's usufructuary interests, and the 44 acres of Plummer's Pleasure, together with the one-fourth of a part of that tract, which he took as tenant in tail on the death of Beall, reverted to the heirs of the donor, who were Richard B. B. the intestate of the complainant, and Jemima, one of the defendants; consequently, upon the death of Jacob, the late Richard B. B. claim commenced for the rents and profits, arising out of his share of the lands which had thus descended to him, as one of the heirs of his grandfather, and which were withheld from him by the defendants, Wells and wife. These claims, as relates to Ledgworth, are not contested, but as to Plummer's Pleasure, they are opposed by the defendants, Wells and wife, on the ground that the late John W. B. had, in fact, no more than a mere equitable interest in that tract of land. That after his death, Jacob paid for it, and obtained a conveyance of the legal title to himself, and that too, with the knowledge of those under whom the complainant claims, and after they had actually received their distributive shares of the personal estate of the late John, which they ought to have applied, or have suffered to be applied, in satisfaction of the purchase money then due for this tract of land. But the deed under which Jacob claims, recites, that the legal estate in the tract called Plummer's Pleasure, had been previously conveyed to his father, the late John W. B. and Basil

Beall; and it also * appears, that the late John W. B. and his son Richard W. B. had held undisturbed possession of this tract of land for upwards of twenty years, which of itself constitutes sufficient evidence of a legal title against every one. But in addition to all this, it appears that Jacob W. B. distinctly, and solemnly by his acts, elected to take and hold this land under the will, and as the devisee of his father, the late John W. B.; thus virtually recognizing a complete legal estate to have been in him, and consequently, neither Jacob, nor any one claiming under him, can now be permitted to question or invalidate the legality of the title of the testator John W. B., in any manner whatever. 1 *Swans*. 394, 425, 433. But Jacob W. B. by his meddling and officious payment of the purchase money, as is alleged, surely cannot be allowed thus to form for himself, and those who claim under him, any ground of equity, whereon, in any way, to resist the claim of the complainant. *Prin. Eq.* 134. As to the Statute of Limitations which has been relied on as a bar, by Wells and wife, the infancy of the complainant's testator is a sufficient answer to that.

It appearing by the proceedings, and having been admitted in the argument, that William Wells, the executor of the late Jacob W. B. had accounted for the whole of the testator's personal estate which came to his hands, and that he had paid or delivered over the surplus, to the defendants, Wells and wife, no relief is asked against him. But the other defendants, Wells and wife, will be held accountable for the rents and profits of so much of Plummer's Pleasure, as the complainants' intestate was entitled to, which accrued and were received by Jacob in his life-time, in respect of the assets, which they derive from him. Whereupon, it is on this 29th December, 1827, adjudged, ordered, and decreed, &c.

From this decree, Wells and wife appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

* *Key* and *Johnson*, for the appellants, cited *Newton vs. Griffith*, 1 *H. & G.* 111, and insisted, that this objection to an allowance for the rents and profits of those parcels of land might be made, although there was no exception to the report of the auditor, on the ground of want of title in the complainant. The Act of 1825, ch. 117, does not preclude the appellant's right to make any question raised by the pleadings; and the answer in this case, by referring to the wills for the rights of the parties, presents the question of what are those rights.

* *Magruder*, for the appellee.

467

ARCHER, J. delivered the opinion of the Court. There is nothing in the peculiar exceptions filed to the auditor's report, which prevents this Court from examining the rights of the parties, in relation to the

rents and profits of any of the lands mentioned in the bill. The answer denies the right to rents and profits, and it could not be necessary to frame the exceptions in such a manner, as would deny rights, which are put in issue by the pleadings.

The case of *Newton vs. Griffith*, 1 H. & G. 111, is conclusive to show, that although an estate tail was devised in Ledgworth, and 44 acres of Plummer's Pleasure, to Jacob W. Brashears, yet that he virtually took an estate in fee; and by the case of *Purnell's Lessee vs. Rider*, decided on the Eastern Shore, the remainder limited to take effect after the determination of the estate tail is inoperative. The same doctrines settle the question, as to the estate to which Richard W. Brashears and Beall Brashears, took under the will of John W. Brashears. They were tenants in common, in fee, of the residue of Plummer's Pleasure, not devised to Jacob W. Brashears. Upon the death of Beall Brashears, his moiety of Plummer's Pleasure descended to Jacob W. B., Richard B., Hester B., and Jemima B.

468 * We perceive nothing in the facts disclosed which ought to prevent the rents and profits from being decreed to the complainant below, according to his interests in the lands.

During the period which elapsed from the death of Richard W. Brashears, till the death of Jacob W. Brashears, the complainants' intestate was entitled to one-half the profits of the residue of Plummer's Pleasure, which was not devised by the will of John W. Brashears to Jacob, and in addition to this, was entitled, as the representative of his father Richard, in consequence of the death of Beall Brashears, to one-sixth of the profits of said residue; for at the death of Beall Brashears, his right in a moiety of the residue descended, to Jacob, Richard, and Jemima Brashears; Hester Brashears having died in 1802, before the right of the complainants' intestate accrued. By the will of Jacob W. Brashears, all his interest in the lands was devised to Jemima, one of the appellants; consequently, after the death of Jacob, the interest of the appellee's intestate remained the same as it was before his death.

The decree of the Chancellor is reversed, with costs to the appellants in this Court, and this Court will direct the auditor of the Court of Chancery to audit the account, according to the principles of this decree, and will direct the costs of the audit to be taxed as the costs in this Court.

Decree reversed.

WELLS et ux. vs. O. BEALL et ux.—1830.

The Court of Chancery has jurisdiction to decree dower, and rents and profits, to the widow, from the death of her husband. (a)

Where dower is claimed at common law, and the husband's title to the land is controverted, it must be made out at law; but it will not therefore

(a) Approved in *Goodburn vs. Stevens*, 1 Md. Ch. 440.

follow, that a bill in Chancery for its recovery is to be dismissed, because the right to dower is denied. The Chancellor should in such case retain the bill for a reasonable time, until the right at law is established. (b) The Statute of Limitations is no bar in equity to a widow's claim for dower, or the rents and profits thereof. *Per* BLAND, Chan.

* **APPEAL** from the Court of Chancery. The bill which was filed in this case by the appellees, Otho B. Beall and Mary his wife, on the 10th of December, 1825, against William Wells of George, and Jemima his wife, the present appellants, and William Wells, executor of Jacob W. Brashears, stated, that some time in the year 1797, a certain John W. Brashears of Prince George County died, leaving five children; one of whom, Richard W. Brashears, the former husband of the complainant Mary, died in the year 1806, intestate, leaving a son, since deceased. That the said John W. Brashears, by a duly executed will, (a copy of which the complainants exhibit,) devised to the aforesaid Jacob W. Brashears, (one of his sons in tail,) 44 acres of a tract of land called Plummer's Pleasure, and also by the said will, devised the residue of the said tract in tail, to be equally divided between the said Richard W. B. and Beall B. (another son,) with cross remainders, to the survivor, and the aforesaid Jacob W. B. That Beall B. died in the year 1801, without issue, and without altering the estate so devised to him, whereby the aforesaid Richard W. B. became entitled to three-fourths of the residue of the said land, and that upon his death, his widow, the complainant Mary, (afterwards married to the other complainant Otho B. Beall,) became entitled to one-third of the rents and profits thereof. That at the death of Richard W. B. in 1806, the said lands were undivided, and they have continued since in the possession and use of Jacob W. B. who has received all the rents and profits of the same, promising to account to complainant Mary, for her dower right therein, but never doing so. That the said Jacob W. B. died in the year 1816, devising and bequeathing his whole estate to Jemima, (one of the appellants,) since intermarried with the other appellant, William Wells of George, and appointing William Wells, the other defendant, his executor. That since the death of Jacob W. B., Wells and wife have had possession of the aforesaid land, and have received to their own use the rents and profits of the same, * promising to account, &c. as the said Jacob W. B. had done before them. **469** Prayer, that William Wells, the executor of Brashears, may be decreed to account with, and pay to the complainants, the rents and profits which accrued to complainant Mary, in the life-time of his testator, and that the appellants (Wells and wife,) may be compelled to do the same, in reference to the rents, &c. accrued since, and for general relief. **470**

(b) Cited in *Spangler vs. Stanler*, 1 Md. Ch. 37; *Boone vs. Boone*, 3 Ib. 498; *Campbell vs. Lowe*, 9 Md. 508; *Cowman vs. Colquhoun*, 60 Md. 188.

The answer of Wells and wife, admits, that John W. Brashears, died in 1797, leaving five children, of whom Richard W., the former husband of complainant Mary, was one. That he died in the year 1806, intestate, leaving an only son. They further admit that John W. B. made such a devise of the tract of land called Plummer's Pleasure as the bill charges, and that Beall B. died in the year 1801, without altering the nature of the estate created in him by the said devise of John W. B. But they expressly deny that Richard W. B. the former husband of the complainant had, or could have, any title to the land so devised to him by John W. B. because the said John W. B. had not himself any title therein. They admit that John W. B. in his life-time, contracted for the purchase of said land, but they deny that he ever paid any part of the purchase money for the same; and they allege, that after his death, Jacob W. B. made a new contract for the purchase of said land, and paid the entire purchase money out of his own private funds, taking a deed to himself for the same. They likewise admit, that from the death of Richard W. B. the said land has been held and used by Jacob W., and themselves, but they deny that either of them ever promised to account to the complainants, or either of them, for any portion of the rents and profits. They insist that Jacob W. B. was the rightful owner and occupier of said lands, and they exhibit and make the will of Jacob a part of their answer, by which he bequeaths and devises the whole of his estate to the defendant Jemima in fee tail general, and therefore they are not accountable to any person, for the rents and issues of
471 * the lands in question. They admit that Jacob died in 1816, as charged.

The answer of William Wells, the executor of Jacob, admits that he was constituted and qualified as his executor, but he alleged and proved that he had settled the estate, and paid over the residue, to the defendant Jemima and her husband William Wells of George, and the bill was dismissed as to him, without any opposition from the complainant's solicitor.

A commission issued, and proof was taken, among other things, in relation to the value of the rents of the land in controversy.—The opinion of the Court of Appeals however, renders a recapitulation of the proof wholly unnecessary.

At December Term, 1827, BLAND, C. passed the following decree :

This case has been intimately associated, and in some respects blended with the case of Otho B. Beall, administrator of the late Richard B. Brashears, against William Wells and others. The two cases were argued together, and admitted to depend upon the same principles, to a certain extent. I therefore took up, and considered the case instituted by Otho B. Beall, as administrator, and have decided it first, because it manifestly involved every material principle of this case, and more.

This suit has been instituted to recover the rents and profits of the dower, to which it is alleged the complainant Mary was entitled, in a portion of the land called Plummer's Pleasure; and her claim is opposed upon two grounds. First, that her former husband Richard W. B. had during the coverture, no more than a mere equitable interest of which she is not dowable, and secondly, the lapse of time, and the Statute of Limitations, is relied on as a bar. But as I have already explained and decided in the case of *Beall as Administrator vs. Wells and others*, the late Richard W. B. the former husband of the complainant Mary, had, during the coverture actual possession, and a good, legal title, * and died seized of three-fourths of that portion of Plummer's Pleasure, which had been devised 472 to him and his brother Beall in tail, by their father the late John W. B. and consequently she was entitled to dower of that land. And with regard to the Statute of Limitations I have formerly decided, that it constitutes no bar, and does not in equity, apply to a widow's claim of dower, or the rents and profits thereof, *Oliver vs. Richardson*, 9 Ves. 222. Whereupon it is on this 29th day of December, adjudged, ordered and decreed, &c.

From this decree the appellants Wells and wife, appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Key and Johnson, for the appellants. The objection to the want of jurisdiction in the Court, is open to us, notwithstanding the answer. In fact the question could not arise until the answer is filed, as it is not until then that the Court can know, that the title to dower will be disputed. A demurrer to a bill like the present, would admit the seisin of the husband, and of course the * right to dower would follow. As a general rule, it is admitted that in reference to dower, Courts of law and equity, have a concurrent jurisdiction; but when the facts upon which the claim rests, are controverted, the title must be established at law, before Chancery can grant relief. *Herbert vs. Wren*, 7 Cranch, 370; *Mundy vs. Mundy*, 2 Ves. Jr. 122; 4 *Kent's Com.* 70; *Jeremy's Equity*, 305; 1 *Johns. Ch. Rep.* 111; *Philips vs. Green*, 3 Ib. 302; *Swaine vs. Perine*, 5 Ib. 482; *D'Arcy vs. Wake*, 2 Sch. & Lef. 391; *Coop. Eq.* 134, 135; *Mundy vs. Mundy*, 4 Brow. Ch. 294. 473

Magruder, for the appellees. 1. The bill filed in this case, would have authorized a decree for profits, and an assignment of dower also. *Chalmers vs. Chambers*, 6 H. & J. 29.

2. If when the right to dower is contested by the answer, it must be established at law before Chancery can relieve, it does not follow, that the bill is to be dismissed. It must be retained until the right is ascertained. But suppose the objection to be a valid one, it should have been presented by demurrer or plea. After answer, it cannot

be insisted on. *Mitf.* 109, 110; *Herbert vs. Wren*, 7 *Oranch*, 370; 2 *Johns. Ch. Cases*, 339; 1 *Fonb.* 19; 2 *Eq. C. Abr.* 382, 383, note (C); *Jeremy's Eq.* 295; *Diamond vs. Billingslea*, 2 *H. & G.* 273; *Mundy vs. Mundy*, 2 *Ves. Jr.* 122; *Mundy vs. Mundy*, 4 *Bro. Ch. C.* 295; *Coke Lit.* 36, (B;) 1 *Madd. Ch. P.* 97. Upon the question of limitations, he referred to *Oliver vs. Richardson*, 9 *Ves.* 222; 1 *Madd. Ch. P.* 197; *Swaine vs. Perine*, 5 *Johns. Ch.* 488.

ARCHER, J. delivered the opinion of the Court. The jurisdiction of the Court of Chancery to decree dower, and rents and profits, to a widow from the death of her husband, seems to be well settled. *Swaine vs. Perine*, 5 *Johns. Ch. R.* 488, and the cases there referred to. It appears to be *equally clear, that where dower is claimed at
474 common law, and the husband's title to the land is controverted, it must be made out at law. *Mundy vs. Mundy*, 4 *Brown*, 295; *Mundy vs. Mundy*, 2 *Ves. Jr.* 122.

But it will not follow, because the right to dower is denied by the respondents, that the complainant's bill is to be dismissed. The Chancellor should retain the bill for a reasonable time, until the right at law is established. *Curtis vs. Curtis*, 2 *Brown Ch. Rep.* 619.

The decree of the Chancellor is reversed, and this Court will remand the cause to the Chancery Court, that such order may be there taken, as is prescribed by this decree.

Decreed, that the decree of the Chancery Court, in this case, be, and the same is hereby reversed, with costs to the appellants in this Court, and it is further adjudged, ordered, and decreed, that the record in this case, and all the proceedings therein, be remanded to the High Court of Chancery, and that the said Court retain the bill, for such time as the Chancellor may think, under all circumstances, reasonable, to enable the female complainant's title to the dower claimed by her in said bill, to be established at law, and that in the event of the said complainant's title to dower, being established in her favor at law, within the time aforesaid, that then, the said Court of Chancery do pass such a decree in the premises, as it might have done, had said title to dower not been controverted; otherwise that the Chancellor pass a decree in the premises, dismissing the complainant's bill with costs.

Decree reversed.

475 * PRICE'S Adm'r vs. TYSON'S Adm'rs.—June, 1830.

Under the 11th section of the Act of 1785, ch. 80, it is the duty of the Court to continue a cause standing under a rule of reference, until an award is returned. The death of both parties, while it remains under that rule, does not abate the action. (a)

(a) See Rev. Code, Art. 67, X, sec. 3; *Turner vs. Maddox*, 8 Gill, 190.

When the parties to a cause, standing under the rule of reference, die before an award returned, and there is ground to warrant the County Court in reinstating the cause upon the trial docket, the regular course is to move for its reinstatement in the name of the original parties; when that is ordered, their death should next be suggested, then their representatives summoned to appear, and upon their appearance, the cause proceeds as in other cases.

Where one of the arbitrators appointed under a rule of Court, had removed from the State, and many years had elapsed since his appointment, without an award being returned, the Court on motion reinstated the cause.

Per HARFORD COUNTY COURT.

APPEAL from Harford County Court. This was an action of assumpsit, brought in Baltimore County Court on the 16th of September, 1815, in the name of John Price, (the appellant's intestate,) against Nathan Tyson, (the appellee's intestate,) and on the suggestion, &c. of the defendant, was transferred to Harford County Court, to March Term, 1817. At August Term, 1817, the whole matter in dispute between the parties was by consent, referred to Lemuel Taylor and Robert Barry, in the usual manner. The cause was continued on the reference docket, until March Term, 1823, when the defendant suggested the death of the plaintiff, and William Price, (the appellant,) appeared as administrator of the deceased, to prosecute of and upon the premises, &c. At August Term, 1823, the plaintiff suggested the death of the defendant, and leave was given to issue a summons, to be directed to the executor or administrator of the defendant to appear, &c. This leave was again given at the next, and at the succeeding terms, until March Term, 1825, when a summons issued to Mary Tyson, Isaac Tyson, and Moses Sheppard, the appellees, as administrators of Nathan Tyson, to appear, &c. at the next term. At August Term, 1825, the appellees being summoned, appeared, * &c. At March Term, 1826, no award 476 having been returned, and the cause having been still continued on the reference docket, the plaintiff prayed that the reference to the arbitrators might be stricken out, and the cause reinstated, suggesting in his petition, that Lemuel Taylor, one of the arbitrators, had long since removed from the State. The Court struck out the reference, and reinstated the cause. The plaintiff then filed his declaration containing sundry counts, charging that Nathan Tyson, in his life-time, to wit, on the 1st of June, 1815, was indebted to John Price, in his life-time, in the sum of \$13,000, for the freight, hire and charter of a certain schooner or vessel called the Eutaw, whereof the said John was owner, for the performance of a voyage from the port of Baltimore to the Island of St. Bartholomews, &c. A rule was laid on the defendants to plead, for which purpose they imparled until the next term. At the next term, (August, 1826,) the defendants moved the Court to correct the docket entries, alleging that it appeared by those entries that the defendant ap-

peared in Court at March Term, 1823, and suggested the death of the plaintiff, when in fact the defendant was not alive at the time the said suggestion was made, and it was made by John Scott, Esquire, who was counsel for the plaintiff, and made the suggestion at the special instance of the now plaintiff. Affidavits were filed, stating that Nathan Tyson died before March Term, 1823, of Harford County Court; that John Scott, Esquire, informed the deponents, that the suggestion of the death of John Price, the original plaintiff, was made by him, acting on behalf of William Price, as administrator of the said John. The Court refused to have the docket entries amended. The defendants then pleaded, "that after this action was instituted, and while the same was pending, to wit, on the 15th of March, 1819, Nathan Tyson, the original defendant therein, died; and that afterwards, and before any suggestion of the death of the said Nathan was made to this Court, to wit, on the 14th of October, 1821, John Price, the original plaintiff herein, died; and this the defendants are ready to verify. Wherefore they pray judgment of the writ and declaration aforesaid, and that the same may be quashed," &c. This plea was supported by affidavit. The plaintiff demurred to the plea, to which there was a joinder in demurrer. The County Court overruled the demurrer, and gave judgment for the defendants, with costs. From which judgment the plaintiff appealed to this Court.

The cause was argued before EARLE, MARTIN, and DORSEY, JJ.

Gill, for the appellant, cited *People vs. Utica Insurance Company*, 15 Johns. 380; 6 Bac. Ab. Stat. 382, 387, 391, 392; 6 H. & J. 388; 1 Chit. Plea. 307, 308; 1 Tidd. 418; *Stev. on Plea*. 90, 91, 93, 393; *Bank of Somerset vs. Whittington*, 5 H. & J. 490; 1 Bacon, 26, 27.

Gwynn, for the appellees, * cited 3 Saun. 209 b, no.; 6 H. & J. 388; Act of 1788, ch. 80, sec. 11.

EARLE, J. delivered the opinion of the Court. Harford County Court decided this case against the plaintiff below, on a general demurrer to a plea in abatement, and, in our opinion, decided it erroneously. The Court went upon the ground, that both the plaintiff and defendant being dead, at the time of the suggestion, parties could not be made under the Act of 1785, ch. 80.

We think the parties were properly made, notwithstanding this circumstance, although the time of making them was not strictly regular. The cause stood in the name of John Price, against Nathan Tyson, and had been referred by consent of parties, and rule of Court, and long continued on the reference docket, waiting the return of the award, before the first suggestion was made. It was made at March Term, 1823, while the case was still depending on the reference docket of the Court, and this is the irregularity which we should not have sanctioned. The 11th section of the Act is positive, that a

case referred, shall be continued, until an award is returned, and a suggestion that might have led to a discontinuance of this suit, and which actually led to making new parties to it, was out of time, and should not have been allowed. The case ought to have been reinstated in the name of the original parties, and the suggestion of the defendant's death, then made by the administrator of the plaintiff.

Judgment reversed, and procedendo awarded.

HAMILTON vs. WARFIELD.—June, 1830.

H. chartered his vessel to W. for a voyage to be made at and from B. to any port or ports in the West Indies, &c. and back to B. where the vessel was to be discharged, the dangers of the seas excepted; there was the usual covenant of seaworthiness on, and during the voyage in the charter party W. agreed to pay a certain sum for each and every month, and so in proportion for a less time, as the vessel should be continued on the voyage—in ten days * after her return to B. or upon hearing of her loss; and also agreed, at his cost, to victual and man **483** the vessel, and pay all port charges during the voyage. *Held*, that this constituted a charter for one voyage, to commence at B. and terminate on the return of the vessel—that *pro rata* freight was only due upon a loss proceeding from the dangers of the seas,—that the contract was an indivisible one,—and the return of the vessel to B. a condition precedent to the payment of freight.

APPEAL from Baltimore County Court. This was an action of covenant upon a charter party of affreightment entered into on the 27th July, 1822, between the plaintiff; now appellant, agent of the owner of the schooner Independence, and the defendant, the appellee, freighter of the said schooner. The said schooner was freighted by the defendant, at and from Baltimore, to any port or ports in the West Indies, Spanish Main, or ports in the Gulf of Mexico, at the option of the freighter, and back to Baltimore, where the said schooner was to be discharged, the dangers of the seas excepted. The plaintiff covenanted with the defendant, that the schooner, on and during the voyage, should be tight, staunch and strong, &c. That the defendant might load and put on board, and unload and take from the schooner, full loading, of such goods, &c. as he should think proper—contraband goods excepted. In consideration of which the defendant agreed to pay to the plaintiff in full for the freight or hire of the schooner, the sum of \$200 for each and every month, and so in proportion for a less time, as the schooner should be continued on the said voyage, in ten days after her return to Baltimore, or upon hearing of her loss; and the said defendant did also agree, at his cost and expense, to victual and man the said schooner, and pay all port charges and pilotage during said voyage, and to deliver said schooner, on her return to Baltimore to the said

plaintiff or his order, and also to keep her insured. It was also covenanted, that in all cases the period of time for the hire of the said vessel was to commence on the 8th of August, 1822, and end on the day of delivery of the vessel at Baltimore to the agent, or in the event of her total loss, upon the day on which she should * be
484 last heard of. The declaration, after stating the charter party, the loading and sailing of the vessel from the port of Baltimore for the port of Chagres, on the Spanish Main; and that from and after the 8th of August, 1822, the defendant had and employed the said schooner in his service for the space of six months, and until the said schooner was lost. That the said schooner was lost while in the service and employment of the defendant, during the voyage mentioned in the charter party, on the 28th December, 1822, at Chagres, on the Spanish Main; of which said loss the defendant had notice on the 10th of June, 1823. Averment, that the plaintiff had kept his covenant, &c. and that the defendant had refused to pay him the sum of \$1,200 for the freight or hire of the said schooner, growing due from the 8th of August, 1822, until the loss of the schooner at Chagres, &c. As a further breach, the plaintiff averred, that on the 1st of August, 1822, the defendant took the said schooner into his service—shipped a cargo on board of her, and dispatched her from Baltimore towards the port of Chagres, on the Spanish Main. That the schooner afterwards arrived at the port of Chagres, and was there unladen by the agents and factors of the defendant. That the defendant, in pursuance of the charter party, kept and retained the said schooner in his service for a long time, to wit, from the 8th of August, in the year last aforesaid, until the 28th of December, in the same year; and afterwards the said schooner was stripped of her sails, rigging, &c. and abandoned by the crew, which the defendant had put on board for the care and navigation thereof. Averment, that the schooner was left a wreck, and was then and there totally lost, and was not further employed by the defendant. Of all which the defendant had notice before the institution of this suit. And after such notice the defendant became liable to pay to the plaintiff the sum of \$1,000 for the freight and hire of the said schooner from the 8th of August, 1822, until the day of her loss, viz. the 28th of December in the same year, the day on which she was
 last heard * of, in the prosecution of the voyage aforesaid, &c.
485 which said sum of money the defendant had refused to pay, &c.

The defendant, after craving *oyer* of the charter party, &c. pleaded, 1st. That the said schooner Independence was not, at the commencement of the voyage aforesaid, and was not, during the said voyage, tight, staunch and strong, but was wholly rotten, unsound, defective and unseaworthy, whereby, and not by reason of any of the perils or dangers of the seas in the said charter party mentioned, the said vessel was prevented from arriving at the port of Baltimore on her

return voyage, &c. He pleaded, 2dly, to the second breach in the declaration assigned, that the schooner Independence, after her arrival at the port of Chagres, and after the delivery of the cargo on the 8th December, 1822, was wholly rotten, unsound, defective and unseaworthy, and was so rotten, unsound, defective and unseaworthy from the commencement of her sailing on the said voyage, and had so continued during the whole of the voyage, whereby the said vessel was utterly disabled and incompetent further to prosecute the said voyage, and was prevented from arriving at the port of Baltimore, on her return voyage, from the causes aforesaid, and not by reason of any of the perils or dangers of the seas mentioned in the charter party, &c.

The plaintiff demurred generally to the first plea.

To the second plea he replied, that the said schooner was not wholly rotten, &c. and that she was not prevented by unseaworthiness existing at the commencement of the voyage, from arriving at the port of Baltimore on her return voyage, &c.

The defendant joined in the demurrer to his first plea, and demurred generally to the replication of the plaintiff to the second plea. The plaintiff joined in the demurrer to his replication to the defendant's second plea.

The County Court overruled the demurrer to the first plea, and ruled good the demurrer to the replication to the second plea, and rendered judgment for the defendant. * From which judgment the plaintiff appealed to the Court of Appeals. **486**

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Gill, for the appellant, contended, that in the construction of charter parties as in other contracts, the intention of the parties to be collected from the instrument, was to guide the Court. In this case, Hamilton let his vessel to Warfield, to perform a voyage to ports not specified in the contract. Warfield was to man and victual the vessel. He was to pay all port charges and pilotage during the voyage. These covenants shew, that neither Hamilton nor his agents, were to accompany the vessel, as in ordinary cases. Taking intention as the guide, the meaning of the covenant that the vessel was to be kept seaworthy on and during the voyage, is that Warfield or his agents should do it, at Hamilton's expense. The covenant for seaworthiness is not a condition precedent, and if any other construction prevails than the one insisted upon, it is still no answer to a claim for freight, when the voyage has been in part performed. The defendant must redress himself by his cross action. 3 *Kent Com.* 159; *Laves on C. P.* 22, 23, 24, 201; *Ritchie vs. Atkinson*, 10 *East*, 295, 311; *Havelock vs. Geddes*, 1b. 555.

The contract to pay the freight on the return of the vessel, was only to fix the time of payment, and not intended to make her return

a condition precedent to the payment. The doctrines of condition precedent are harsh and unjust. In this case they would operate inequitably. *There is no rule more substantially just than **489** that, which refers plaintiff and defendant for breaches of covenant after part performance to their respective cross actions. *Havelock vs. Geddes*, 10 *East*, 567; *Hallett vs. Col. Ins. Co.* 8 *Johns.* 272; *Laws on C. P.* 162; 3 *Kent*, 157.

Taney, (Attorney-General) for the appellee. 1. The contract in this case, was not to pay so much per month, but was for an entire sum, for an entire voyage out, and back to Baltimore; *Abbot on Shipping*, 360, (*Ed.* 1828,) 362, 364; 10 *Petersd. Abr.* 147, 155.

2. The covenant to pay so much per month, for the voyage, on the return of the vessel, or in ten days after notice of loss, (the dangers of the sea excepted,) means a loss technically by the dangers of the sea, and a total loss. If the loss results from any other cause, the freight is not recoverable; being an entire voyage, the freight is payable on two contingencies; first, upon the return of the vessel; or secondly, upon her total loss, by the perils of the sea. These being conditions precedent, (*Abbot on Shipping*, 329, note (1,) (*Ed.* 1828,) to entitle the plaintiff to a *pro rata* freight, the loss must not only be total, and irreparable, but also by the dangers of the sea, unless caused by the defendant, or his agents. To show the meaning of a loss by the perils of the sea, he referred to 5 *Petersd.* 378, 379.

The plea to the first breach laid in the declaration is, that the vessel was unseaworthy at the commencement of the voyage, and that thereby, the voyage was defeated; this plea the demurrer **490** admits to be true. In support of it * he referred to *Abbot*, 252, 253. The question upon this plea is, whether in the case of an entire voyage, a party can recover freight, who stipulates for the seaworthiness of his vessel, when he admits that voyage to have been defeated by unseaworthiness. In support of the defendant's demurrer to the replication to the second plea, he referred to, 10 *Petersd.* 146, (note;) *Ib.* 151.

MARTIN, J. delivered the opinion of the Court. It appears from the charter party relied on in this case, that the schooner Independence was chartered by Warfield, to perform a voyage at and from Baltimore, to any port or ports, in the West Indies, Spanish Main, or in the Gulf of Mexico, and back to Baltimore. The intention of the parties where it can be fairly obtained from a charter party ought to prevail in its construction, and we think it is manifest from the terms of the agreement, that this constituted but one voyage, to commence at and from Baltimore, and to terminate on the return of the vessel to the same place: It is agreed in express terms that the freight should be \$200 a month, for the time the vessel was performing this voyage, to be paid in ten days after her return to Baltimore.

We do not take into consideration that part of the charter party, that allows a *pro rata* freight for the time the vessel was engaged in the voyage, in case of a total loss, because we think it forms no part of this case, that relates only to a loss, proceeding from the dangers of the sea. The cases referred to in the argument to shew a covenant, that a vessel forthwith be made tight, staunch, and strong, &c. is not a condition precedent, and if the freighter uses the vessel he shall be chargeable with freight *pro rata*, &c. would have great weight, where the case rested upon such a covenant alone, but in this charter party the stipulations are, not only that the schooner on, and during the said voyage, should be tight, &c. but also that the freight should be paid in ten days after the return of the * vessel to Baltimore. The question then upon which this case 491 depends, and upon which it must be decided, is, whether under this charter party, the return of the Independence back to Baltimore is a condition precedent to the payment of freight? Upon examining the English authorities, many nice, and almost imperceptible distinctions, may be found upon the doctrine of freight *pro rata itineris*, but it seems to be settled, that where freight is to be paid after the return of the vessel from her destined voyage, her return is a condition precedent, and no freight is demandable, until that condition is performed. Here is a contract between the parties, in writing, under seal, and the terms of their agreement expressed in plain and unambiguous language. It cannot, we think, be doubted, that it was the clear intention of the contracting parties, that Warfield should have the benefit of the whole voyage, at and from Baltimore, and back to the same place; and this voyage being performed he was in ten days afterwards to pay the freight; this is an indivisible contract, the freight depending upon the performance of the whole voyage, and by the express agreement of the parties, not to be demandable until after the vessel should return to Baltimore; if the vessel was lost by the dangers of the seas, then a *pro rata* freight was to be allowed, and paid in ten days after the loss was ascertained; but if no injury was sustained from that cause, the whole voyage was to be performed, and then, and not till then, the charterer had a legal claim for freight. The case of *Smith vs. Wilson*, 8 East, 437, is an authority in point to sustain this case on the part of the appellee. That was an action to recover freight on a charter party of affreightment, not exactly similar in all its provisions to the one now before us, but sufficiently so, to decide the question upon which this case depends. In the reported case, among other covenants not necessary to be here enumerated, it was stipulated that the ship being properly fitted, &c. should receive or take on board at London or Portsmouth, such goods as the freighter might think proper to ship, and should sail and proceed * therewith to Monte Video, &c.; and being 492 arrived there, should give due notice thereof to the agents of the freighter, and make a right and true delivery, &c. and after

such delivery should receive and take on board from the freighter, or his agents, &c. a full and complete cargo of lawful goods and immediately set sail from thence, and proceed to some one port of discharge in Great Britain, &c. and there deliver the said cargo, &c. and there end his said intended voyage, (the act of God, the King's enemies, and the dangers of the sea excepted,) in consideration whereof the freighter covenanted that he would pay £670 sterling per month, for every calendar month the ship should be employed by him, during the said intended voyage to Monte Video and back to her port of discharge, and so in proportion for any less time, in full for the freight, or hire of said ship during her intended service; such freight to commence from the day the ship should be ready to receive the goods on board at Portsmouth, and end when she should have finally discharged the whole of her said cargo, &c. such freight, &c. to be paid on the arrival of the said ship at her destined port in Great Britain. The ship took on board a cargo at Portsmouth and commenced the voyage, but from causes stated in the report, never did arrive at her destined port in Great Britain. The Court decided that by the terms of the charter party, the freight, &c. thereby covenanted to be paid, on the part of the defendant, are all of them expressly covenanted to be paid, on the arrival and discharge of the ship at her destined port in Great Britain; and of course, are made to depend on the event of such arrival and discharge, at her destined port in Great Britain, as a condition precedent to the plaintiff's right to demand the same. This doctrine is recognized by Lord Ellenborough, in *Ritchie vs. Atkinson*, 10 *East*, 308,—he says where, as in *Smith and Wilson*, the freight is made payable upon an indivisible condition, such as in that case, the arrival of the ship with her cargo at her destined port of discharge; such arrival, &c. must be a * condition precedent, because it is incapable of being

493 apportioned, *Cook vs. Jennings*, 7 *Term Rep.* 381. We are of opinion, that as the schooner *Independence* did not return back to Baltimore, within the terms of the charter party, the freight claimed, never became demandable by law.

Judgment affirmed.

GLENN vs. SMITH, Adm'r *d. b. n.*, *c. t. a.* of HASLETT.—December, 1830.

G. as administrator of A. took possession of various articles of personal property left by her, part of which she held as executrix of H. and sold them. Some years after this, letters of administration *d. b. n.* upon H's estate were granted to S. who brought trover against G. for that part of the property which had originally belonged to H. *Held*, that although S. was present at such sale and purchased some of the articles, yet he was not precluded thereby from recovering from G. for this conversion.

Letters testamentary or of administration granted in another State, give no authority to sue, or to administer assets in this State; and will not ex-

empt a party from liability, in an action by the rightful administrator here, though distribution be made in conformity to such letters. (a)

H. died indebted to I. leaving A. his executrix, who came into the possession of assets, and paid I. the notes mentioned in the following receipt, written at the foot of his account: "Received of A. executrix of H. two promissory notes signed by herself, and endorsed by G. & Co. in payment of the above account." Before these notes arrived at maturity, A. died, and G. her executor, took possession of her estate and sold it, and paid the notes in question. Letters d. b. n. upon the estate of H. were granted to S. who sued G. in trover for the value of property which belonged to H. but which G. had sold as executor of A. *Held*, that the acceptance by I. of the notes in question, was not an extinguishment of the debt due him by H.; that the payment by G. was, therefore, the payment of H's debt, and entitled him to deduct that payment from the proceeds of H's personal property sold by him.

The acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt, if it remains in the hands of the creditor unpaid, and he can produce it to be cancelled, or show it to be lost. But the creditor will not be suffered to recover on the original cause of action, unless he can show the note to have been lost, or produces it at the trial, to be cancelled. (b)

* The acceptance by a creditor, of a note or bill of a third person, for a pre-existing debt, is no payment or extinguishment of such debt, unless the creditor parts with it, or is guilty of laches in not presenting it for payment in due time. (c) **494**

In either of the above cases, an express agreement by the creditor to receive the note or bill absolutely as payment, and to run the risk of its being paid, is an extinguishment of the previous debt, whether the note or bill be afterwards paid or not. Such agreements are not to be implied from the use of the words, "in payment of the above account," in a receipt for the note. (d)

(a) Recognized in *Lucas vs. Byrne*, 85 Md. 494; *Wright vs. Gilbert*, 51 Md. 152; *Bank vs. Sharp*, 53 Md. 528. A voluntary payment by a debtor in this State to the executor or administrator of his creditor, appointed in another State where such creditor was domiciled at the time of his death, is valid, when such payment is made before the grant of administration in this State. *Bank vs. Sharp*, *supra*.

(b) Affirmed in *Hopkins vs. Boyd*, 11 Md. 118; *Morrison vs. Welty*, 18 Md. 175, 176; *Matthews vs. Dare*, 20 Md. 275; *Myers vs. Smith*, 27 Md. 50; *Hoopes vs. Strasburger*, 37 Md. 408; *Harness vs. Canal Co.* 1 Md. Ch. 257, 258. Distinguished in *Blake vs. Pitcher*, 46 Md. 467, as having no application to a Mechanics Lien proceeding. See *Ins. Co. vs. Smith*, 6 H. & J. 141, note; *Wyman vs. Rae*, 11 G. & J. 416.

(c) Affirmed in *Crawford vs. Berry*, 6 G. & J. 72; *Lewis vs. Brehme*, 38 Md. 490; *Haines vs. Pearce*, 41 Md. 231, 233.

(d) Affirmed in *Hurley vs. Hollyday*, 35 Md. 478; *Hoopes vs. Strasburger*, 37 Md. 401; *Haines vs. Pearce*, 41 Md. 231. See note (e), *infra*; *Trisler vs. Williamson*, 4 H. & McH. 147, note. If the agreement to accept a note as payment was induced by fraudulent misrepresentations, the receipt given is invalid. *Hoopes vs. Strasburger*, *supra*. The words "express agreement" in the paragraph in the text mean that such must be proved to have been the contract or agreement between the parties. But it is not required to be expressed in terms; it may be established by the facts and circumstances

To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shewn. (e)

The acceptance of a note by a creditor for a precedent debt, is a suspension of his right of action until the note reaches maturity. (f)

There are acts of intermeddling, such as locking up the goods of a deceased person for safe-keeping, which will not charge a man as executor of his own wrong.

The taking the goods of an intestate by a stranger, and using or selling them, and in general any intermeddling with them, will, as respects creditors, make him an executor *de son tort*, and chargeable with the debts of the deceased, so far as assets come to his hands.

As against creditors an executor *de son tort* is justified in paying the debts of the deceased; and if sued by such he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot in any case, retain any part of the goods of the deceased in satisfaction of his own debt.

In trover by a rightful executor against a wrongful one, for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debt; but under the general issue, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, as when the debts are just, and there is no deficiency of assets. (g)

APPEAL from Baltimore County Court. This was an action of trover, instituted on the 15th February, 1826, by the appellee,

attending the transaction, which, taken in connection with the language of the parties, justify the influence that such was the agreement and intention of the parties. Whether such a contract existed between the parties is a question for the jury. *Haines vs. Pearce, supra*, affirmed in *Ecker vs. Bank*, 59 Md. 303.

(e) Affirmed in *Iron Co. vs. Wingert*, 8 Gill, 177; *Berry vs. Griffin*, 10 Md. 80; *Folk vs. Wilson*, 21 Md. 551; *Warfield vs. Booth*, 33 Md. 74; *Peter vs. Beverly*, 10 Peters, 568. See also, *Clopper vs. Union Bank*, 7 H. & J. 74; *Yates vs. Donaldson*, 5 Md. 390. "If any legal principle can be well settled by repeated uniform decisions, the cases which have been referred to must be sufficient to show, that where an account is due, and the creditor receives from his debtor a promissory note 'in payment of the account,' giving a receipt in those terms, the note is not a satisfaction or extinguishment of the original claim, unless there be evidence, in addition to the receipt, for the purpose of proving an agreement that the creditor was to receive the note as payment, and to run the risk of its being paid." *Berry vs. Griffin, supra*. Taking the individual note of one member of a firm for merchandise sold to the firm, will not discharge the other members from liability therefor, unless such individual note is taken with an agreement and understanding, that the other members are to be discharged from such liability; and such agreement must appear affirmatively. *Folk vs. Wilson, supra*.

(f) Approved in *Mudd vs. Harper*, 1 Md. 115; *Hunter vs. Van Bomhorst, Ibid*, 514-516; *Yates vs. Donaldson*, 5 Md. 396.

(g) Cited in *Lee vs. Rutledge*, 51 Md. 318.

James Smith, as administrator *de bonis non, cum testamenta annexo*, of William W. Haslett, against the appellant, Elias Glenn. The case has already been before this Court, and will be found in 7 H. & J. 17.

The defendant pleaded not guilty, and *actio non*, &c. to which there were issues.

* 1. At the trial, the plaintiff having given evidence that the articles stated in the plaintiff's *narr.* were the property of 495 plaintiff's testator, and were converted by defendant to his use, the defendant then proved that Doctor William W. Haslett, the plaintiff's testator, was, at the time of his death, indebted to a certain John Heslip, in the sum of \$1,261.40, as is stated and appears by the account herewith exhibited.

"1814.	Dr. William W. Haslett, dec'd.	To John Heslip.
May 4.	To balance due on land.....	\$337 50
	To amount of stock, to wit, horses, cows, sheep,	
	hogs and farming utensils, purchased	852 50
	To interest on one-half, per agreement, for six	
	months,.....	17 85
	To interest on the other half of the above, per	
	agreement for 18 months.....	53 55

\$1,261 40

"May 4th, 1814. Received of Mrs. Ann Haslett, executrix of William W. Haslett, two promissory notes signed by herself, and endorsed by John W. Glenn & Co. in payment of the above account.

JOHN HESLIP."

And then proved, the signature of John Heslip to said receipt. He also gave in evidence, the two promissory notes mentioned in the said receipt though the payment in fact. And proved, that said notes were paid by the defendant as executor of Ann Haslett, and that the defendant was, when said notes were given, and afterwards, one of the said firm of J. W. Glenn & Co. and then offered to contend before the jury, that for the amount of said payment he was entitled to be allowed out of the value of the property in dispute in this cause, but which the Court, [HANSON and KELL, A. J.] refused to permit, and said, that John Heslip having accepted the notes of Ann Haslett in payment of his claim against William Haslett, (and passed his receipt for the same,) which notes and receipts on the bill are referred * to and inserted above, extinguished his, the said Heslip's 496 claim against the estate of William Haslett, and he became the creditor of said Ann Haslett for the amount of said notes, and that the defendant Elias Glenn, having paid the said notes, as executor of Ann Haslett, he, although an endorser thereon, as one of the firm of John W. Glenn & Co. is not entitled to be allowed the same as a payment made by him for the estate of William Haslett, as executor *de son tort* of said William. The defendant excepted.

2. The defendant in addition to the testimony stated in the preceding bill of exceptions, offered in evidence to the jury, by Mathew Murray, a competent witness, that part of the property claimed by the plaintiff in this suit, was exposed to sale at auction by the defendant, sometime in November, 1814; and further proved by said witness who was auctioneer at said sale, that James Smith, the present plaintiff, was at said sale, and was a purchaser, to the best of said witness' recollection, but of what articles witness could not recollect.

The plaintiff then, offered in evidence to the jury, the letters of administration *de bonis non* on the estate of William Haslett, granted him by the Orphans' Court of Baltimore County, and which are dated July 21st, 1821. And further proved, that at the said sale at auction mentioned by the aforesaid witness, Matthew Murray, the defendant sold, together with the said part of the goods claimed by the plaintiff in this suit, a considerable quantity of other goods, and that defendant sold the whole of said goods at said sale, as executor of Anne Haslett, the widow of plaintiff's testator. And the said Matthew Murray, being cross-examined by the plaintiff's counsel, stated, that he had no knowledge of a purchase by the plaintiff, of any of the goods now claimed by him, or for which he seeks to recover in this suit, but that, to the best of witness' recollection, the plaintiff was a purchaser at the sale aforesaid, but whether the things so purchased were a part of the said property in dispute in this action, the witness does not know, except as * before stated.

497 Whereupon the defendant prayed the opinion of the Court to the jury, that inasmuch as the plaintiff was a purchaser, at the sale of property made as aforesaid, by defendant, as executor of Ann Haslett, of a part of the said property belonging to the estate of Doctor Haslett, and which is in controversy in this suit, it is not competent to him now to deny in this action the legality of said sale, and that he is not entitled to recover more than he would have been entitled to recover, if said sale had been in every way legal and proper, which opinion and instruction the Court refused to give. The defendant excepted.

3. In addition to the testimony stated in the two preceding bills of exceptions, the defendant further offered in evidence, that letters of administration *c. t. a.* on the estate of the said William Haslett, were duly granted him in the State of Delaware, on the 14th of February, 1815, and proved that the property of the said Doctor Haslett in controversy in this suit, was, after the issuing of the said Delaware letters of administration, and after, the defendant had also obtained letters testamentary upon the estate of Ann Haslett, and before the plaintiff obtained his letters of *adm. de bonis non*, upon the estate of said Doctor Haslett, out of the Orphans' Court of Baltimore County, taken possession of, and sold by defendant, as executor of said Ann, at the sale at public auction mentioned in the preceding exceptions.

Whereupon the defendant prayed the opinion of the Court to the jury, that upon the whole evidence aforesaid, if they believe it, the said possession and sale, so as aforesaid taken and made, by said defendant, of said property of Doctor Haslett, was so far legal and valid as not to render the said defendant liable in this action to the plaintiff. Which opinion, the Court refused to give, the defendant excepted; and the verdict and judgment being against him, he prosecuted the present appeal.

* The cause came on to be argued before BUCHANAN, C. J., EARLE and MARTIN, JJ. **498**

Taney, (Attorney-General,) and *Johnson*, for the appellant, contended: That assuming from the evidence, that the appellant, was executor *de son tort*, he is entitled to *recoupe* in damages, the amount paid by him, as stated in the first exception.

The debt paid by the appellant did not cease to be the debt of William Haslett, when Ann, his executrix, gave her notes for the amount, it still continued a claim against his estate, which was not discharged from it, until the money was paid by Glenn.

Ann Haslett had no authority over the property in controversy, except as executrix of William Haslett, and upon her death, the right passed to the administrator *de bonis non* of William. The appellant, as the administrator of Ann, had no title to interfere with it, and consequently, by taking possession and selling, he became executor *de son tort*, and as such, had a right to set off payment made by him, on account of William's estate. *Tobey vs. Barber*, 5 *Johns. Rep.* 68; *Johnson vs. Weed*, 9 *Ib.* 310; *Kearslake vs. Morgan*, 5 *Term Rep.* 513; *Puckford vs. Maxwell*, 6 *Ib.* 52; *Toller's Ex'rs*, 365; *Ib.* 363; *Bishop vs. Rowe*, 3 *Maul. & Selw.* 362; *Burdick vs. Green*, 15 *Johns. Rep.* 247; *Gallagher vs. Roberts*, 2 *Wash. C. C. Rep.* 191; *Ins. Co. vs. Smith*, 6 *H. & J.* 166; *Bower's Adm'r vs. The State*, 7 *Ib.* 32; *Olopper vs. Union Bank*, 7 *Ib.* 92.

The second exception they abandoned.

On the third exception, they insisted, that the letters granted the appellant in Delaware, are sufficient to protect him, in an action sounding in damages. When the appellant took possession of, and sold the property, in virtue of his Delaware letters, administration had not been granted appellee in this State, the former therefore cannot be punished as a trespasser, for an act done under such circumstances.

Samuel I. Donaldson, and *Belt*, for the appellee, submitted on notes. On the first exception they referred to *Fishwick vs. Sewell*, 4 *H. & J.* 429; *DeSobry vs. DeLaistre*, 2 *H. & J.* 224; *Mountford vs. Gibson*, 4 *East*, 445; 1 *Ventris*, 349; *Toller*, 365; 2 *Bl. Com.* 511; *Coulter's Case*, 5 *Co.* 30. On the third exception, Act of 1813, c. 165; *Fenwick vs. Sears*, 1 *Cranch*, 259; *Morrell vs. Dickey*, 1 *Johns. Ch.* 153; *Goodwin vs. Jones*, 3 *Tyngs*, 514; *Riley vs. Riley*, 3 *Day*, 74.

BUCHANAN, C. J., delivered the opinion of the Court. There are three bills of exceptions, upon which this case is brought before this tribunal.

The suit is an action of trover, by the appellee as administrator *de bonis non*, of the estate of William Haslett, with the will annexed, for certain goods and chattels which belonged to William Haslett, his testator, and were left unadministered by Ann Haslett, deceased, whom in his will he constituted his executrix.

The second exception was abandoned in the argument, by the counsel for the appellant, and clearly could not be sustained. The prayer assumes the fact that the appellee was a purchaser, at a sale by the appellant, as executor of Ann Haslett, of a part of the property belonging to the estate of William Haslett, and in controversy in this suit, (though * without stating what part of the prop-
505 erty in controversy,) and upon that assumption, asks the opinion of the Court to the jury, that the appellee is not competent to deny the legality of the sale, nor entitled to recover the value of the property so assumed to have been bought.

Now besides, that whether there had been such a purchase or not by the appellee, was a matter proper to be left to the jury, the fact assumed does not appear in this part of the cause. There is no evidence connected with this bill of exception, that the appellee ever purchased any part of the property in controversy, or any goods that belonged to the estate of William Haslett, and the Court could not have done otherwise than reject the prayer, even if the fact assumed, had it been proved, would have justified such a direction. But if, in point of fact, the appellee did in November, 1814, purchase at a public sale by the appellant as executor of Ann Haslett, a part of the property, for which this suit was brought, it by no means follows that he should not for that reason, be permitted to deny the propriety, or legality of that sale, nor entitled to recover *quoad* the property so sold. He was not then the administrator *de bonis non* of the estate of William Haslett—his letters of administration were not issued until the 21st July, 1821, more than six years afterwards; and there is no proof in the record, that he knew any part of the goods sold to have been the property of William Haslett, if in truth they were, or that he intended in any manner to intermeddle with that estate. He did no wrong himself, and did nothing to lead the appellant into any error, nor was there a semblance even of any management or collusion between them. He was as a mere stranger, and had the same right to purchase at a public auction, that any other had; and there is no reason why the appellant, who sold the goods as the executor of Ann Haslett, and received the fruits of that sale, should be protected against a recovery of the value, in an action of trover by the appellee, who afterwards became the administrator *de bonis non* of William Haslett, by the mere fact, * that he
506 was himself the purchaser, under circumstances calculated to

induce the belief that they belonged to the estate of Ann Haslett. It is of no consequence who was the purchaser. The appellant wrongfully taking and selling the goods, became answerable for their value; to which the appellee, on obtaining his letters of administration, became entitled, as the legal representative of William Haslett, and it is not a case within the principle, upon which *Whitehall vs. Squire* was determined in *Carth.* 104, where the plaintiff having received from the defendant, a horse that belonged to the intestate for services performed about the funeral of the intestate, at defendant's request, afterwards administered on the intestate's estate, and brought an action of trover against the defendant, for the value of the horse so received by him before he administered; it was decided by two Judges against Holt, that he was not entitled to recover, because he was a *particeps criminis*, in the very act of wrong complained of, the intermeddling with the estate, and receiving a part of it in discharge of a claim, from the hands of one, having no authority to deliver it. There is no pretence of any such intermeddling by the appellee here.

The third exception rests upon the legal effect of letters of administration with the will annexed, of the goods and chattels of William Haslett, granted in the State of Delaware to the appellant. By the testamentary system of this State, the manner in which assets are to be distributed is prescribed, and the administrator is to give bond and security, and render an account of his administration in the Orphans' Court. And it is the settled and well known law of the State, that letters testamentary, or of administration granted in another State, give no authority to sue, or to administer assets here. Our Courts can take no notice of letters testamentary, or of administration granted abroad; and the same law prevails generally in this country, and it is also the law of England. If that be the case, and we can take no notice of the letters of administration granted to the appellant * in the State of Delaware, how can they have the effect to make legal and valid, any possession taken, or **507** sale made of the property of William Haslett by the appellant, and to exempt him from liability in an action by the rightful administrators. So far as concerns his liability in this suit they are as blank paper, and cannot legalize acts otherwise tortious; it is as if he had no letters, and could not therefore rightfully take possession of, and sell the property of William Haslett; but in doing so without any authority known to the laws of the State, was a wrong-doer, and cannot protect himself under cover of that, which gave him no authority to act. Moreover, for aught appearing in this exception, the appellant did not take possession of, and sell the property, under any supposed authority derived from the Delaware letters of administration; on the contrary, the proof as set out in the record is, that he took possession of the property in controversy and sold it, as the executor of Ann Haslett, which he could not do under letters of administration upon the estate of William Haslett. The Court there-

fore did right in refusing to direct the jury as prayed; "that the possession, and sale so proved, of the property in dispute by the appellant, was so far legal and valid, as not to render him liable in this action to the appellee."

We come now to the consideration of the first exception, which presents the only remaining question in the cause to be disposed of, and that is, whether under the evidence stated in this bill of exception, (out of which we cannot look to the testimony contained in any other exception, and not connected with this) the appellant was entitled to have recouped in damages, the payments made by him to John Heslip, who was a creditor of William Haslett. This being an action of trover by the rightful administrator for the value of the goods mentioned in the declaration.

The proof as stated is, that the goods belonged to William Haslett the testator of the appellee; and after his death were taken by the appellant and converted to his use. That William Haslett died indebted to John Heslip, in the sum * of \$1,261.40; that Ann **508** Haslett, executrix of William Haslett, on the 4th May, 1814, gave to John Heslip, her two promissory notes endorsed by John W. Glenn & Co. in whose favor they were drawn, one for \$612.85, payable six months after date, and the other for \$648.55, payable eighteen months after date, making together the sum of \$1,261.40, the amount of his account against William Haslett; at the foot of which account, he wrote a receipt for the notes so given him, which is in these words: "Received of Mrs. Ann Haslett, executrix of William W. Haslett, two promissory notes signed by herself, and endorsed by John W. Glenn & Co. in payment of the above account." That afterwards and before the institution of this suit, the appellant, as executor of Ann Haslett, paid to John Heslip, the amount of each of those notes. For these payments he claimed to be allowed at the trial, out of the value of the property in dispute, which the Court refused to permit, on the ground that the notes given by Ann Haslett, and received by John Heslip for the amount of his claim against William Haslett, extinguished that debt, and made him the creditor of Ann Haslett for the amount of his notes, with no remaining claim against the estate of William Haslett.

The first enquiry then to which our attention is directed, is as to the legal effect, and operation of the acceptance by John Heslip of the notes of Ann Haslett, so given and received by him. And in the absence of all evidence upon the subject, except the receipt of John Heslip, at the bottom of his account, we think it clear, that his acceptance of Ann Haslett's notes did not extinguish his claim against the estate of William Haslett. The general rule is, that the acceptance of a security or undertaking of equal degree, is of itself no extinguishment of the former debt. Thus the acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt, (both

being of equal degree in the eye of the law) if it remains in the hands of the creditor unpaid, and he can produce it to be cancelled, * or show it to be lost. But he will not be suffered to recover on the original cause of action, unless he can show the note to **509** have been lost, or produces it at the trial to be cancelled. So too, the acceptance by a creditor of a note, or bill of a third person, for a pre-existing debt, is no payment or extinguishment of such debt, unless the creditor parts with it, or is guilty of laches in not presenting it for payment in due time. *Kearslake vs. Morgan*, 5 Term Rep. 513; *Puckford vs. Maxwell*, 6 Term Rep. 52; *Bishop vs. Rowe*, 3 Maul. & Selw. 362; *Swinyard vs. Bowes*, 5 Ib. 62; *Burdick vs. Green*, 15 Johns. 247; *Ins. Co. vs. Smith*, 6 H. & J. 166, or unless in either of the cases put, there is an express agreement by the creditors to receive it absolutely as payment, and to run the risk of its being paid. In which case it is to be taken, as an extinguishment, or payment of the precedent debt, whether the note or bill be afterwards paid or not. *Clark vs. Mundal*, Salk. Rep. 124; 7 Term Rep. 60; *Tobey vs. Barber*, 5 Johns. 68; *Johnson vs. Wood*, 9 Ib. 310.

The expression, "in payment of the above account" at the end of John Heslip's receipt for Ann Haslett's notes are the only words used, that can be supposed to have any tendency to show that he had agreed to receive them in full and absolute discharge of his prior debt, and to take upon himself, the risk of their being paid, or not; which is the agreement necessary to be proved, to give to his acceptance of them, the effect to extinguish the pre-existing debt, (the notes having never passed from his hands until taken up by the appellant) and for that purpose his receipt is relied upon. But it would be going very far to say, that the mere use of the words, "in payment of the above account," furnishes proof of such an agreement. It could be but an inference, and that stronger than the words will bear, or the character of such transactions justify. If there had been any such agreement, the presumption is, (if presumption can be indulged in) that it would have been * stated in the receipt. The very negotiation upon the subject would **510** have indicated the expediency of its being so stated. And in the absence of any such statement, are we at liberty to infer it? And infer it from what? Not from that, which (in the ordinary use of the terms) naturally points to such an agreement, and which if unexplained, would admit of no other fair inference; but from that, which looking to the character of such transactions, may well be understood to have been intended, as an acknowledgment only, that the notes were given for, and on account of the precedent claim against the estate of William Haslett; to show what was the consideration of the notes, and to furnish Ann Haslett the executrix, with a necessary document in the settlement of her accounts; not an acknowledgment that the original debt was absolutely paid, nor of an agreement to take the notes in absolute payment, and to dis-

charge the estate of William Haslett from all further liability; but only that the notes when paid, should be in discharge of the original debt, showing on what account they were given, and to prevent a recovery on both causes of action.

This would seem to be the fair understanding of the receipt, no motive appearing to induce John Heslip, to take the notes in full and absolute payment, and to discharge the estate of William Haslett. And it is believed to be in accordance with the usual understanding of such receipts, creditors not being presumed when they take the notes of third persons, on account of precedent debts, to intend to receive them in absolute payment, and extinguishment of such debts; but only *sub modo*, that is, in the event of their being paid, unless otherwise expressed in the receipts, and we are not without judicial decisions in consonance with this view of the subject.

In *Kearslake vs. Morgan*, 5 Term Rep. 513, it was conceded, that a promissory note of a third person accepted, and received by a creditor, "for, and on account of a debt due him," was not of itself an extinguishment of that debt. * And what is a receipt of a
511 note in payment of a debt, more than a receipt for, and on account of a debt. Money received for, and on account of a debt, is received in payment of it.

In *Puckford vs. Maxwell*, 6 Term Rep. 52, where the plaintiff had accepted a bill in part payment of his debt, Ld. Kenyon said, "if the bill which is given in payment, do not turn out to be productive, it is not that which it purports to be, and which the party receiving it, expects it to be, and therefore we may consider it as a nullity, and act as if no such bill had been given." There the fact of a note being given in payment, was held not to be an extinguishment of the debt. And what is this receipt more than an acknowledgment, or evidence of the same fact, that the notes were given in payment.

The same principle has been followed out in the Courts of New York. In *Tobey vs. Barber*, 5 Johns. Rep. 68, there was a receipt by a landlord to his tenant in these words, "received of Ralph Barber \$163 on account of the within lease, and in full for the second, and third quarter's rent." It turned out in evidence that the sum of \$163, mentioned in the receipt was made up in part of money paid by the defendant to the plaintiff, and in part of a note of a third person given to the plaintiff, and it was decided, that there was no evidence that the plaintiff agreed to run the risk of the solvency of the maker of the note, and to take the note in absolute payment, except by inference arising from the receipt, which was not enough to establish such a positive agreement. There was a receipt in full purporting to be for cash, which might have afforded some ground for supposing that the plaintiff intended to treat the note as cash, and to put it on the same footing with the money received, which as far as it went, was a discharge of so much of the rent. It is a stronger case than this.

In *Johnson vs. Weed and another*, 9 *Johns. Rep.* 310, where the plaintiff having sold goods to the defendants, received the note of a third person for the amount, and gave * the defendants a bill of the goods, with a receipt in full at the bottom, it was held **512** that the terms of the receipt were not decisive, and it might be understood, consistently with the words of it, that the note was received in full, under the usual condition of its being a good note.

And in *Putnam vs. Lewis, Adm'r of Lewis*, 8 *Johns. Rep.* 389, where the plaintiff having a demand against the estate of the defendant's intestate, received the defendant's promissory note for the amount, and gave him a receipt in these terms, "received of George R. Lewis, \$53.96, it being in full of all demands, which I have against the estate of Eber Lewis, deceased," it was decided that the note was no payment of the debt. That case and this, are nearly identical, and if there be a difference, that is the strongest case. There can be no real distinction between a receipt in full of all demands, and a receipt in payment of all demands. In both cases the notes were given by the representatives of the deceased, for debts due from the deceased, and the only difference is, that in this, the receipt is for the notes themselves, and in that case the receipt was for the money, specifying the amount, and so far at least, treating the note, (which was all that was in fact received) as money.

To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shown; an express agreement to receive it as payment, and to run the risk of its being paid, which is not sufficiently done by the receipt in this case, to justify us in saying that the claim of John Heslip against the estate of William Haslett, was extinguished by his acceptance of Ann Haslett's notes.

Considering then, the claim of John Heslip as not extinguished until the notes of Ann Haslett were paid, but his right of action only suspended during the period allowed for the payment of the notes, was the appellant who made the payment, entitled to have them recouped in damages.

It has been suggested by the counsel for the appellee, that it is incumbent on the appellant to entitle himself to the * allowance he claims, to show the solvency of the estate of William Haslett. No question appears to have been raised in the Court below upon that subject, and it will be considered here as if there was no deficiency, indeed it is not suggested, nor does there appear to be any deficiency: treating it then, as a case clear of all question relative to the sufficiency of assets, if it was a suit by a creditor of William Haslett, there could be no doubt, on the plea of *plene administravit*, that he would be entitled to an allowance for the payments made to John Heslip, if they are to be taken as payments of John Heslip's claim against the estate of William Haslett. **513**

There are acts of intermeddling, such as locking up the goods of a deceased person for safe-keeping, which will not charge a man as executor of his own wrong; but the taking the goods of an intestate by a stranger, and using or selling them, and in general any intermeddling with them, will as respects creditors, make him an executor *de son tort*, and chargeable with the debts of the deceased, so far as assets come to his hands. But as against creditors he is justified, in paying the debts of the deceased; and if sued by a creditor he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot, in any case, retain any part of the goods of the deceased in satisfaction of a debt due to himself. There is, however, a difference between a suit by a creditor, against an executor *de son tort*, and one by a rightful executor or administrator. If the action by the latter be trover for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts. But on the general issue pleaded, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, or in the language of some of the books, made in due course of administration. *Carth.* 104; *Bull. N. P.* 48; 2 *Blk. Com.* * 507; **514** *Mountford vs. Gibson*, 4 *East Rep.* 441; *Toll. L. Ex'rs*, 363, 364; *Parker vs. Kelt*, 12 *Mod.* 471.

What then is this case? We have already said, and attempted to show, that the acceptance of John Heslip, of the notes by Ann Haslett, was not a payment or extinguishment of his claim, against the estate of William Haslett, but that the original debt continued, notwithstanding the receipt of those notes. Had Ann Haslett paid those notes, she would, by doing so, have discharged the original debt—and the payments having been made by the appellant as her executor, makes no difference. They were her notes, and he as her executor was bound to pay them, if assets sufficient came to his hands; and in paying them, he paid the original debt, on account of which they were given. It is not the payment of the notes, as the debts of Ann Haslett, on which his claim to recoupe, rests; but the payment of the original debt that remained in force, until discharged by him, with which the amount of the notes was identical. Where it is said that the payments to be recouped in damages, by an *executor de son tort*, in trover by a rightful executor or administrator, must be such as are made in the due course of administration, it is meant, such as the rightful executor or administrator would have been bound to make, as where the debts were just, and no deficiency of assets. And that is this case. The payment by the appellant of the claim of John Heslip, against the estate of William Haslett, was such as the appellee would have been bound to make, and we think he was entitled to have the amount recouped in damages.

The cases of *Mountford, Adm'r of Holland vs. Gibson*, 4 East, 441; and *Fishwick vs. Sewell*, 4 H. & J. 399, referred to by the counsel for the appellee, are not like this.

We concur with the Court below, in the 2d and 3d exceptions, but dissent from the opinion expressed in the 1st, and therefore reverse the judgment. *Judgment reversed, and procedendo awarded.*

INDEX TO 2 G. & J.

References are to top pages.

ABATEMENT.

See ARBITRATION AND AWARD, 1.

ACCOUNT.

See EQUITY, 8.

ACTION.

An action instituted by L. upon a single bill payable to "L. executor of B." is an action in his own right, to which a debt due from him may be pleaded, and proved as a set-off; and he cannot go into evidence of the consideration of the bill, to shew that it was given for a debt due B. in order to exclude the set-off as due in another right. *Turner vs. Plowden*, 276.

See ASSUMPSIT, 1.

BOND, 5.

CONTRACT, 7.

PROMISSORY NOTES, 5, 6.

ADVERSE POSSESSION.

See LANDLORD AND TENANT.

APPEAL AND ERROR.

1. This Court, since the Act of 1825, ch. 117, so far as regards the common law cases, is strictly an Appellate Court, deciding every cause upon the question submitted below, and upon none other. *Davis vs. Leab*, 186.
2. So where after the evidence had been all offered in the County Court, the defendant prayed the Court to instruct the jury, that the plaintiff was not entitled to recover, and the Court gave the instruction, but the record did not show the point upon which that Court acted, this Court can neither reverse nor affirm—in such case the appeal must be dismissed. *Id.*

See BOND, 11.

EQUITY, 18.

ARBITRATION AND AWARD.

1. Under the 11th section of the Act of 1785, ch. 80, it is the duty of the Court to continue a cause standing under a rule of reference, until an award is returned. The death of both parties, while it remains under that rule, does not abate the action. *Price vs. Tyson*, 288.
2. When the parties to a cause, standing under the rule of reference, die before an award returned, and there is ground to warrant the County Court in reinstating the cause upon the trial docket, the regular course is to move for its reinstatement in the name of the original parties;

ARBITRATION AND AWARD.—*Continued.*

when that is ordered, their death should next be suggested, then their representatives summoned to appear, and upon their appearance, the cause proceeds as in other cases. *Ib.*

3. Where one of the arbitrators appointed under a rule of Court, had removed from the State, and many years had elapsed since his appointment, without an award being returned, the Court on motion reinstated the cause.—*Per HARTFORD COUNTY COURT. Ib.*

ASSIGNMENT.

1. The common law restrains the assignment of an entry for a condition broken, where, after the forfeiture incurred, the estate may continue; but it allows it where the violation of the condition puts an end to the estate of the particular tenant. *Gwynn vs. Jones*, 104.
2. It is a case of constant occurrence, where a grantor, having a right of entry on land, conveys it to another, and therewith, necessarily, the power to maintain an ejectment for it. *Ib.*

See EQUITY, 7.

PROMISSORY NOTES, 5.

ASSUMPSIT.

1. To maintain the action for use and occupation, it is not necessary for the plaintiff to prove an express contract with the tenant, when he first takes possession, nor an express reservation of a certain rent, nor that the tenant has paid rent. It may be maintained on an implied undertaking where the permissive holding is established: and if it appears that a certain rent was reserved, the reservation may be used to regulate the damages. But if one enters as a trespasser, the action for use and occupation cannot be maintained. *Stockett vs. Watkins*, 199.
2. Where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the *tort*, and sue in *assumpsit* for the proceeds; and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the *tort*, and then recover their value for the time of their detention in *assumpsit. Ib.*

BALTIMORE CITY.

See TAXES.

BANKRUPTCY AND INSOLVENCY.

1. In a suit by a trustee of an insolvent debtor, claiming in his character of trustee, a general issue plea does not admit the character in which the plaintiff sues. *Winchester vs. Union Bank*, 45.
2. To establish the right of such a trustee, the plaintiff, under the general issue, must prove every thing essential to the showing himself clothed with the character and authority of a trustee, which cannot be done by the production of the certificate of the commissioners of insolvent debtors, and the final discharge of the insolvent only, but all the proceedings must be exhibited. *Ib.*
3. The different insolvent laws of this State constitute one general system and must be construed together; and so construed, require a bond with security to be given, before a trustee can act as such, without which, he cannot be invested with the character and rights of a

BANKRUPTCY AND INSOLVENCY.—*Continued.*

trustee. To establish his character as trustee, and his right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given, by proof of the bond itself. *Ib.*

4. The trustee of an insolvent debtor derives his right from his appointment, and the insolvent laws requiring that he shall give bond with security, for the faithful performance of his duty, before he acts as such, until such bond is given, he is not invested with the functions of trustee, and can neither sue for, nor in any manner intermeddle with the property of the insolvent. *Winchester vs. Union Bank*, 48.
5. So one appointed such trustee, having given bond after he brought suit, cannot maintain it. *Ib.*
6. An insolvent debtor who has obtained his final discharge, and released to his trustee all his interest in the property in dispute, and residue of his estate after paying his debts is a competent witness in an action in which his trustee is plaintiff, to prove, that at the time a certain deed was executed by such witness and his partner to the defendant, who was their creditor, they contemplated becoming insolvent debtors, and apprised the defendant of such intention, who advised them to make such deed, and then apply for the benefit of the insolvent laws, and promised to aid them thereafter, though the effect of such testimony would be to avoid his deed, under our insolvent system. *Glenn vs. Von Kapff*, 83.

See CONTRACT, 7.

BILLS OF EXCHANGE.

1. In an action against the endorser of an inland bill of exchange, payable after date, which had been protested for non-payment, and due notice thereof given to the defendant, a letter from the plaintiff to the administrator of the drawer of the bill, dated some time after the bill became due, was given in evidence by the defendant, which stated that the plaintiff "had agreed with the drawer to secure the amount of the said bill, and others, drawn by him and protested, by instalments, to wit, \$300 every sixty days, and requiring payment of two instalments then due"—*Held*, that in the absence of proof of any consideration to support the agreement mentioned in the letter, the County Court erred in giving an unqualified instruction to the jury, that the defendant was discharged from all liability. *Planters Bank vs. Sellman*, 143.
2. The holder of a bill of exchange may by an agreement with the drawer to give him further time for payment, discharge an endorser. *Ib.*
3. But it is not every mere naked agreement, by the holder with the drawer for delay, that will discharge the endorser after he has been fixed in his responsibility by non-payment, and due notice given. *Ib.*
4. It is clear, both on principle and authority, that it must be a binding engagement, without the assent or concurrence of the endorser, and one that will suspend the holder's remedy, and restrain him from bringing suit against the drawer before the expiration of the time given, to the prejudice of the endorser, or so as to affect his rights. *Ib.*

BILLS OF EXCHANGE.—*Continued.*

5. To do this, it must have a sufficient consideration to support it, otherwise it is *nudum pactum*, and does not affect or suspend the rights of any of the parties. *Ib.*

BOND.

1. A recital in the condition of a bond may restrain indefinite expressions used in it, and adapt them to the intention of the parties. *Wayman vs. State*, 156.
2. Where a surety is sued upon a bond, the utmost that can be recovered is the penalty, and legal interest thereon, by way of damages for the detention of the debt from the time the debt is demanded—that is the import and effect of his contract, and his accountability cannot be stretched beyond it. *Ib.*
3. It is not in every case that interest by way of damages is to be recovered on the penalty, and when the case occurs, it may be considered as an exception to the general rule, which limits the recovery by the penalty in the bond. *Ib.*
4. Where a jury is called upon to assess the damages for breaches assigned or proved in the condition of a collateral bond, and are wholly unauthorized by the issue to find damages for the detention of the debt, a recovery must be limited to the penalty of the bond. *Ib.*
5. Where various persons have distinct demands secured by the same bond, a recovery and payment in one suit can be no bar to other actions, in which the several claimants may recover to the same extent, and can only be limited by the penalty, and in particular cases by the penalty and interest. *Ib.*
6. In an action upon the official bond of the Register of the Court of Chancery by the State, for omitting to make the proper record books, a recovery may be had for omission to record proceedings in suits to which the State was not a party, and on account of which nothing was paid to such register by the State. The measure of damages is the sum paid by the State for doing that, which the officer should have done. *Ib.*
7. The records of our Courts of justice are to be considered as public property, and so important is it to the community, that they should be made up correctly, and preserved with care, that when a neglect in these particulars occurs, an obligation is imposed on the State to supply the defect, and have the work done at the expense of the treasury. The defaults of the officers, are thus visited on the public, and their bonds afford the only means of security for the State to resort to against loss. *Ib.*
8. The bond required from executors by the Act of 1798, ch. 101, subch. 14, sec. 6, is a testamentary bond within the meaning of the Act of Limitations, of 1729, ch. 24, sec. 21, and an action upon such bond not commenced within 12 years after the passing the same, will be barred by pleading the Act of 1729, aforesaid. *State vs. Boyd*, 223.
9. Any bond required by law to be given by an executor or administrator, by reason of the assumed representative character of executor or administrator, and to secure the payment of debts and legacies, or the faithful administration of assets, is a testamentary or administration bond, as the case may be. *Ib.*

BOND.—*Continued.*

10. K. sued out a writ of replevin, gave the usual bond, and the sheriff replevied the goods demanded. Judgment being rendered against him, he appealed and filed the usual appeal bond conditioned to prosecute his appeal with effect, and satisfy the damages and costs awarded by the county and Appellate Courts. Judgment was rendered against him upon the appeal. In an action upon his appeal bond the following questions were decided:

- (1.) That a replication assigning as a breach "that the defendant did not prosecute his appeal with effect to the damage of the plaintiff, &c." was sufficient upon general demurrer, and was an answer to a plea of general performance, and to a plea "that the defendant did prosecute his appeal with effect."
- (2.) That a plea in bar "that the appellant paid the debt, damages and costs adjudged by the County Court, and all costs and damages that were awarded by the Appellate Court," is defective upon general demurrer, being no answer to the judgment for a return of property and costs.
- (3.) That a plea in bar "that the replevin bond was, after the recovery in the Appellate Court, and before the institution of this action, sued against B. (the surety of K. therein) to judgment, and that B. satisfied the plaintiff for that judgment," is also defective upon general demurrer. The costs of the Appellate Court are not paid by such satisfaction, nor does the plea show that the judgment of the County Court was satisfied before this action was brought.
- (4.) That the plaintiff might give in evidence the value of the goods replevied: the record of the replevin was proper evidence to identify them, and the appraisement made in such cases was *prima facie* evidence of their value.
- (5.) That the plaintiff's right to recover interest on the value of the goods replevied and costs of the replevin, was a question exclusively for the jury, and that the bills of exceptions taken and signed in the action of replevin, could not be read to the jury to show that interest ought not to be allowed.
- (6.) That the record of the judgment against B. the surety, and the execution thereupon issued, returned "*cepi*," "staid by injunction," is not evidence to show that the plaintiff had been satisfied that judgment, or that the amount thereof ought to be allowed by the jury in the assessment of damages. *Karthauss vs. Ourings*, 261.

11. The sound legal construction of the condition of an appeal bond, is, that it is an undertaking to reverse the decision appealed from, or satisfy the judgment of the Appellate Court. *Ib.*

See BANKRUPTCY AND INSOLVENCY, 3, 4, 5.

CONSTITUTIONAL LAW, 4.

EXECUTORS AND ADMINISTRATORS, 11.

PLEADING, 2.

CASE. ACTION ON THE.

See EQUITY, 6.

CHARTER PARTY.

- H. chartered his vessel to W. for a voyage to be made at and from B. to any port or ports in the West Indies, &c. and back to B. where the

CHARTER PARTY.—*Continued.*

vessel was to be discharged, the dangers of the seas excepted; there was the usual covenant of seaworthiness on, and during the voyage, in the charter party W. agreed to pay a certain sum for each and every month, and so in proportion for a less time, as the vessel should be continued on the voyage—in ten days after her return to B. or upon hearing of her loss; and also agreed, at his cost, to victual and man the vessel, and pay all port charges during the voyage. *Held*, that this constituted a charter for one voyage, to commence at B. and terminate on the return of the vessel—that *pro rata* freight was only due upon a loss proceeding from the dangers of the seas,—that the contract was an indivisible one,—and the return of the vessel to B. a condition precedent to the payment of freight. *Hamilton vs. Warfield*, 291.

CONSIDERATION.

The consideration of natural love and affection is sufficient in a deed, but a mere executory contract, cannot be supported on the consideration of blood, or natural love and affection. There must be something more, a valuable consideration, or it is not good, and cannot be enforced at law, but may be broken at the will of the party. *Pennington vs. Gittings*, 122.

CONSTITUTIONAL LAW.

1. All appointments to office, under the Constitution, by the executive of the State, are made by the authority of the 40th, 48th and 49th sections, and the Register in Chancery not being commissioned during good behavior, is necessarily an officer of annual appointment, under the 49th section. *State vs. Wayman*, 156.
2. The tenure of his office being limited, he cannot continue to act after his term expires, except in the single instance of the appointment of a successor, in which case he may act until such successor, commissioned in his stead, is qualified. If re-appointed, he may continue to act without any new commission or qualification, but unless re-appointed he is not legally an incumbent of the office, and cannot lawfully perform any of its duties. *Ib.*
3. Where the Constitution limits the duration of an officer to a certain term, no irregularities in the proceedings of the appointing power, can extend it beyond that period. *Ib.*
4. Where it was *held*, that the bond of B., who was commissioned as Register in Chancery, in January, 1812, and gave his said bond on the 24th January, 1816, in conformity to the Act of 1742, c. 10, was executed with an express reference to the provisions of the Constitution, and that its condition did not create a responsibility beyond them; that its object was to engage for a faithful discharge of duties as long as they could be legitimately performed under the official grant and no longer, and that the defendant was responsible under the bond for the conduct of B. as Register of the Court of Chancery, to the expiration of the third week in November, 1816. *Ib.*
5. The Constitution is to be construed with reference to the laws existing at its adoption, and the practice under them. *Ib.*

CONTRACT.

1. Where it was *held*, that upon the true construction of a certain order by S.—who had contracted with an insurance company to rebuild by

CONTRACT.—*Continued.*

- a certain date a mill destroyed by fire, (said company having elected to rebuild the same,) and who had drawn said order on said company to pay to K. \$750 out of the last instalment of \$1,000 to be paid to S., under his said contract,—K. was entitled to receive the \$750 from the company, only in the event of S's becoming entitled to receive his last instalment of \$1,000. out of which it was to be paid, upon complying with the terms of his contract, to rebuild the mill by said date. *Kemp vs. Baltimore Fire Ins. Co.* 67.
2. Upon a bill being filed to recover the value of certain negroes, which M. held in trust for the complainant, and which had been sold through the intervention of an agent who considered himself entitled to the proceeds, it was agreed between M. and the agent, that if M. would delay settlement and permit the agent to retain the money, and defend the bill, he, the agent, would indemnify him from all loss. A final decree having passed against M. in an action brought upon his contract of indemnity, *held*, that it was competent for the defendant to give in evidence, that he had apprised the plaintiff in due time of the nature of the defence, which he desired should be made to the suit, and of the sources by which he meant to establish it, so as to enable the plaintiff, by resorting to such evidence, to ascertain if he could be justified in putting in such an answer as was desired; and also to show that the plaintiff had failed to comply with his contract, by refusing to permit him to defend the bill. *Morris vs. Chapman*, 175.
 3. If the defendant supplied the plaintiff with a proper answer, supported by such proofs as would furnish the latter with a reasonable ground to believe the facts stated in the answer to be true. he was bound by the spirit of his contract to have accepted and filed it, or put in answer containing in substance the same defence. *Ib.*
 4. Whether such answer was furnished, and such proofs given as would lay a reasonable ground for the plaintiff's believing the defence set up by the defendant, was a question of fact for the jury, to be determined by an exhibition of the answer and proofs in support of it, as communicated to the plaintiff. *Ib.*
 5. If the plaintiff in his conscience could not put in the answer furnished him by the defendant, good faith on his part demanded that he should have pointed out his objections and difficulties to the defendant. *Ib.*
 6. The law sometimes implies contracts, but never when there is an express contract, or facts exist wholly inconsistent with the contract to be implied. *Stockett vs. Watkins*, 199.
 7. Where, in an action by C. to recover compensation for services rendered in attending to the claim of K.,—the owner of a vessel sunk for its protection from the public enemy,—who had written a letter to C. in reference thereto, in 1821, and who, it appeared, had been discharged in 1817 from his contracts under the insolvent laws of Maryland, it was *held*, (the whole allowance having been retained by the Government and passed to the credit of K's bonds for duties then unpaid,) that there was evidence for the jury to find a contract between C. and K. and they might as fairly infer that it was entered into a little anterior to the letter of 1821, as before the insolvency of 1817—and that if the plaintiff was to be paid out of the

CONTRACT.—*Continued.*

sum to be allowed on account of the vessel, yet if he had been deprived of it by the defendant's means, the defendant was personally liable—that the United States under the circumstances being authorized to retain the allowance in payment of the defendant's bonds, their claim being a just one, and the plaintiff having no lien on the fund in the Treasury, the defendant still remained liable. *Kalkman vs. Causten*, 218.

8. Where it was *held*, that in construing a certain contract between joint owners of a line of stages, that the Court must endeavor to arrive at the meaning of the parties, by looking to the motives that led to it, and the object intended to be effected by it. *Davis vs. Barney*, 231.
9. The intention of the contract was that the defendant should, in good faith, not only not become interested in any opposition, but that he would not in any manner aid or become instrumental in the setting up, or carrying on an opposition line. *Ib.*
10. The defendant having pledged himself not to be concerned, "direct or indirect," in any line of stages in opposition to the plaintiff, *held*, that the word "indirect" was used for the special purpose of guarding against any kind of interference by the defendant, in aiding, or in any manner promoting the establishment of, or carrying on, any opposition. *Ib.*
11. A line of stages being established in opposition to the plaintiff's line, the Court *held*, that if the defendant furnished its owners with money, credit, or other means, for the purpose of enabling them to carry it on, and that the means so furnished, did enable them to establish and carry it on, and that they could not have established or carried it on without such means, or that the defendant did furnish them with money, credit, horses, or any other means, for the purpose of enabling them the better to establish or carry it on, and that such means did so enable them, then the plaintiff was entitled to recover damages for a breach of the said contract. *Ib.*

See *BILLS OF EXCHANGE*, 1, 5.

CHARTER PARTY.

CONSIDERATION.

EQUITY, 7, 8.

LAW AND FACT, 1.

CORPORATION.

Where it was *held*, in an action by a vestry of a church, (a corporation,) to recover the price of a pew, that the corporation were authorized to employ one of its members as an agent, and of course there was no want of legal competency in such member to be an agent for the purchaser in making the memorandum required by the Statute of Frauds. *Stoddert vs. Vestry*, 140.

See *EVIDENCE*, 6.

PROMISSORY NOTES, 1.

COSTS.

See *BOND*, 10.

COURT RECORDS.

See *BOND*, 7.

EVIDENCE, 8, 9.

CRIMINAL LAW.

1. By the Act of 1826, ch. 251, declaring that "It shall not be lawful for any person within this State, to have in possession any ticket of any lottery, not granted or permitted by this State, with intent to sell, negotiate or dispose of the same, to sell, negotiate, or advertise in any way whatever, any such ticket or part of a ticket, &c." it was the great object of the Legislature to prevent the sale of unauthorized tickets, and for that purpose the law prohibited both the possession of such tickets with intent to sell, and the selling of them; *Held*, therefore, that the word "such," did not refer to the possession of the seller, as part of the description of the ticket which would be unlawful to sell, for that would legalize the selling of tickets by any person, who at the time of the sale had not possession, and defeat the obvious intent of the law. *State vs. Scribner*, 152.
2. In an indictment under the above Act of Assembly, the lottery ticket or part of a ticket should be set out—the sale of only such tickets, as are not authorized by the State, is prohibited, and it would be proper that the ticket should be set out, that the Court might see whether it were a ticket, the sale of which was authorized or prohibited. *Ib.*
3. In all cases of larceny, very particular descriptions of the goods taken have never been considered necessary, and the description given in the law which enacts the offence in statutable larcenies, has in general been deemed sufficient—this doctrine is founded partly on the fact that the prosecutor is not considered as in the possession of the article stolen, and is not, therefore, enabled to give a minute description; and principally because, notwithstanding the general description, it is made certain to the Court from the face of the indictment, that a crime has been committed, if the facts be true. *Ib.*

DAMAGES.

See BOND, 2, 3, 4, 6.

DEBTOR AND CREDITOR.

See PROMISSORY NOTES, 8, 9, 10, 12.

WILLS, 3, 4, 5.

DEED.

1. To give a deed a legal effect and operation, as a deed under a decree of the Court of Chancery, a copy of the record ought to be produced, to show the trust reposed in the grantor, and his legal performance of it. *Shilknecht vs. Eastburn*, 71.
2. Although a deed cannot have legal operation as a deed under a decree of Chancery, without producing the record, yet it shall be taken most strongly against the grantor; and such legal interest as he had, capable of being transferred, may pass thereby. *Ib.*
3. By the Act of 1766, ch. 14, sec. 2, conveyances to pass an estate in lands for above 7 years, are required to be enrolled within six months from their date. The enrolling officer is directed immediately, upon the receipt of any such deed, to endorse thereon the time of his receiving it—to enrol it, and, "on the back of every such deed, in a full legible hand, make a certificate of such enrolment, and the time of making it." An original deed of that character,

DEED.—*Continued.*

cannot be read as evidence of title, without offering proof of the hand-writing of the officer who endorsed it. *Gwynn vs. Jones*, 104.

4. Where, G. and T. being seized in fee, as tenants in common of a certain tract, a certain deed from G. to T. was held to be valid to pass to T., all the right of G. to a moiety of said tract. *Gwynn vs. Thomas*, 254.

See CONSIDERATION.

EQUITY, 1.

DESCENT AND DISTRIBUTION.

See EQUITY, 2.

EXECUTORS, 6.

HUSBAND AND WIFE.

DOWER.

1. Where, certain land having been conveyed in fee by one of the children of M. to H., then a married man, who gave bonds to the children for, and executed a mortgage of the land to them, to secure the payment of, their several shares of their father's estate,—the deed, mortgage and bond having all been executed at the same time,—and upon H's death it being ascertained that the land was insufficient to pay the mortgagees, if subject to a claim of dower in favor of H's widow, it was held, that she was not entitled to dower. *McCauley vs. Grimes*, 194.
2. There is no general rule, in strictness, that in cases of instantaneous seisin the widow shall, or shall not, be entitled to dower. This must depend as well upon the character of the seisin, as its duration. *Ib.*
3. Where a man has the seisin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed. *Ib.*
4. Where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed. *Ib.*
5. Where one is seized for the combined use of himself and others, and his interest, real or contingent, is not susceptible of any particular ascertainment, but is necessarily undefined, and is to be postponed until the gratification of all the uses to which his seisin is subservient, it is not a case of beneficial seisin for his own use, so as to endow his wife to the prejudice of the other uses. *Ib.*
6. The Court of Chancery has jurisdiction to decree dower, and rents and profits, to the widow, from the death of her husband. *Wells vs. Beall*, 284.
7. Where dower is claimed at common law, and the husband's title to the land is controverted, it must be made out at law; but it will not therefore follow, that a bill in Chancery for its recovery is to be dismissed, because the right to dower is denied. The Chancellor should in such case retain the bill for a reasonable time, until the right at law is established. *Ib.*
8. The Statute of Limitations is no bar in equity to a widow's claim for dower, or the rents and profits thereof.—*Per BLAND, Chan.* *Ib.*

EJECTMENT.

1. Where boundaries called for in a grant can be established, it is a settled principle of construction, that the courses and distances ex-

EJECTMENT.—*Continued.*

- pressed, are to be disregarded, and the lines run to the boundaries, according to the calls. *Rogers vs. Raborg*, 83.
2. Where it was *held*, that upon the true construction of a certain patent, the beginning being ascertained, the location of the land must be governed by the particular description given in the case, by courses and distances, they having no calls or binding expressions to control them. *Ib.*
 3. Where it was *held*, that a certain deed could only convey to its grantees, the tract therein named according to its original lines, metes, and bounds, and that they could transfer no title to land claimed in this action. *Shilknecht vs. Eastburn*, 71.
 4. A location of a tract of land by one party in ejectment, not counter-located by the other, is admitted to be correct; that is, that the land is correctly described on the plots; but it does not admit the title to the land. *Ib.*
 5. To recover in ejectment, when defence is taken on warrant, the plaintiff must shew the true position of the land by location, and also that he has a legal right to the land thus located. *Ib.*
 6. The law is well established, that facts to aid a title may, in some cases, be presumed. *Ib.*

See ASSIGNMENT.

DEED, 8.

EVIDENCE, 1, 2, 3.

EQUITY.

1. A *feme covert*, in consideration of a creditor of her husband giving him further time to pay his debt, executed a deed jointly with her husband, in form a mortgage, of real estate, to secure its payment. This deed was not acknowledged according to the Acts of Assembly in relation to conveyances of land by *feme covert* grantors, nor did it purport to be in execution of a power reserved to her, but being for property, in fact held in trust for her separate use, which she had a right to convey as a *feme sole*, was considered in equity as creating a specific lien, and enforced accordingly. *Brundige vs. Poor*, 1.
2. The real estate of an intestate was adjudged incapable of division, and elected to be taken at the appraisement per acre, under the Act of Descents, by one of the heirs, who gave his bonds accordingly, conditioned to pay the co-heirs their several proportions of the appraised value of the land. Such heir, who was also the administrator, in consideration of retaining the amount of the intestate's debts to be paid by him, out of the proceeds of the real estate, delivered over the intestate's personal property to his co-heirs. It was afterwards discovered, that the land fell short of the estimated quantity, on which the appraisement was founded. In this case, a bill in equity, in which all the co-heirs were made defendants, was held to be a proper mode of obtaining relief, as well to rectify the error in the estimate of the land, as to obtain credit for the debts paid: which payments, if they exceed the proceeds of the land, may, as essential to full relief, be recovered back. *Gibbs vs. Clagett*, 8.
3. Upon the establishment of such a case, it is the duty of the Chancellor to direct the auditor to state an account between the parties;

EQUITY.—*Continued.*

- and the order to the auditor should invest him with the usual authority of taking testimony, upon the subject-matter of the account. *Ib.*
4. The objection that a bill is multifarious, should be raised by a demurrer, before answer; filing an answer, and going into an examination of testimony, as to the merits of the whole matter in controversy, is a waiver of that objection. *Ib.*
 5. If a bill be liable to be dismissed for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief. *Ib.*
 6. An agreement by the distributees of the personal estate, to refund to the administrator the amount paid by him, to the creditors of the deceased, beyond assets, is the subject of a special action on the case at law, not of a bill in equity. *Ib.*
 7. Where it was *held*, that an assignment of a party's interest in a mortgage, might be good and operative, without actual delivery, if connected with evidence to show he intended it to transfer his interest, in the thing assigned. That the assignment in this case had all the forms and solemnities necessary to constitute a good contract, was in the assignor's hand-writing, signed by him, and contained a full expression of his intention to transfer his interest in the mortgage. *Aldridge vs. Weems*, 22.
 8. A Court of equity has the power, and will make every possible effort, within the range allowed by the Statute of Frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law. *Ib.*
 9. Under the Act of 1820, ch. 161, sec. 1, the Chancellor is not authorized to take a bill as confessed, and entirely disregard the testimony which the interlocutory order directed in that Act to be passed, requires to be taken, under an *ex parte* commission to support the allegations of the bill. The final decree in such case must be sanctioned by the evidence taken under the commission. *Purviance vs. Barton*, 191.
 10. C. filed a bill in Chancery to recover dower in certain real property, upon which that Court appointed a receiver to receive the rents and profits pending the controversy. After this, the Mayor and City Council of Baltimore filed their petition against the receiver, praying to be paid for taxes due on said property prior to the time of the receiver's appointment, out of the rents which had come to his hands. The petition did not aver that there was no personal property of the tenant in possession to be found sufficient to pay the taxes charged, nor was the tenant in possession at the time the taxes became due, who by law, is chargeable with their payment, made a party. *Held*, that they could not recover. *Mayor, &c. of Balto. vs. Chase*, 227.
 11. It is a well settled principle, that the Court of Chancery will not order a receiver to pay over, or account for the rents and profits to a party, when the land is not charged with the payment of his claim. *Ib.*
 12. Rents and profits are recoverable in equity from those who take possession of a minor's real estate. *Wells vs. Beall*, 278.
 13. It is not necessary, under the Act of 1825, ch. 117, to file exceptions to the auditor's report, to take advantage of objections in the Appellate Court, which the pleadings in the cause put in issue, and which

EQUITY.—*Continued.*

do not depend upon the state of the accounts, though an account may be ultimately necessary to ascertain the extent of the claim. *Ib.*

See DOWER. 6, 7, 8.

EXECUTORS AND ADMINISTRATORS, 2, 3.

GIFT, 1, 4.

LIMITATIONS, 5.

MORTGAGE.

WILLS, 1.

EVIDENCE.

1. It is a settled rule of evidence, that if a person who has been regularly sworn and examined on the ground, upon a survey executed in an action of ejectment, dies before the cause is tried, or leaves the State, and goes to parts unknown and without the reach of the process of the State, so that his attendance as a witness cannot be procured, his deposition so taken, and returned with the plots, may be read in evidence at the trial from necessity. *Rogers vs. Raborg*, 33.
2. So the deposition of a witness sworn and examined under the same circumstances, and who had become paralytic since his examination, and though regularly summoned, was unable to leave his house, or to speak so as to be understood, may also be read in evidence at the trial, for the same reason. *Ib.*
3. Locations made by a lessor of the plaintiff in an action of ejectment, as, and for his claim and pretensions to a tract of land, being transferred to the plots in another action of ejectment, brought against those claiming under the lessor in the first action, and who took defence for the same tract in the second action, are competent, though not conclusive evidence for the plaintiff in the second action, to shew the true location of such tract, although the first action was dismissed. *Ib.*
4. An inventory made and returned by an administrator to the Orphans' Court, after he has commenced an action for the recovery of the property included therein, is not competent evidence for him at the trial of the cause; for he might become personally liable for the costs of the suit. *Allender vs. Riston*, 52.
5. The sheriff's schedule of goods returned, as taken and delivered in an action of replevin at the suit of R. may be read in evidence by the plaintiff, (who was one of the defendants in the replevin,) in an action against R. for the purpose of proving that R. was in possession of the same goods, on the day after they were first taken. *Ib.*
6. In an action against a corporation, the affidavit of the president thereof made for the purpose of procuring a continuance, in another cause than that in which it was offered as evidence, is not competent testimony against such corporation, though the subject-matter of the affidavit be pertinent to the issue. He should be sworn as a witness, the defendant being entitled to a cross-examination. *Kemp vs. Baltimore Fire Ins. Co.* 67.
7. In an action by a vestry of a church, (a corporation) to recover the price of a pew, it appeared by the evidence of one of the members of the vestry, that he had acted as auctioneer in the sale of the pews.

EVIDENCE.—*Continued.*

and had put down in pencil, at the time of the sale, on paper, the name of the purchaser, the defendant, and the price at which a pew was bid off. This memorandum was delivered to the register of the vestry, who transcribed it in the record book of their proceedings, returned it to the witness, who had made diligent but unsuccessful search for it, and believed it was lost. *Held*, that parol evidence of the price of the pew, and that it was sold on a credit of twelve months, bearing interest from the time of sale, as it would have established a different contract from that contained in the memorandum, was not competent to go to the jury. *Stoddert vs. Vestry*, 140.

8. Evidence which leaves the mind in doubt, whether by a further search, certain record books sought for, might not have been regained, is not sufficient to let in parol evidence of their contents. *Wayman vs. State*, 156.
9. Where it was the duty of the Register in Chancery to make and keep records of the proceedings of his Court, his report to the Chancellor that he had made such records, and the statement of the Chancellor on the minutes of the Court, that such records had been made up, do not constitute primary evidence to shew that such records were made, and in the absence of satisfactory proof of the loss of the record books themselves, are not admissible as secondary evidence of the same fact, nor is the estimate of a subsequent Register, made by the direction of the Legislature, of the sum it would require to furnish a substitute for such record books, nor his evidence that the same had been all correctly made up, admissible under such circumstances. *Ib.*
10. Where it was *held*, in an action brought against A., who was Adm'r d. b. n. of S., and Ex'r of L., that the widow's admissions, that she held the land and negroes as the plaintiff's tenant, and by his permission, were not competent evidence to charge the defendant; that the evidence was not sufficient to warrant the inference, that the relation of landlord and tenant subsisted between the plaintiff and defendant, the facts and circumstances not being such as usually attended a permissive holding; but that he was responsible for the hire of the negroes, during the time he had them. *Stockett vs. Watkins*, 199.

See ACTION.

BANKRUPTCY AND INSOLVENCY, 2, 3.
 BOND, 10.
 CONTRACT, 2.
 DEED, 3.
 EJECTMENT, 6.
 EXECUTORS AND ADMINISTRATORS, 2, 3, 4.
 INSURANCE, 10.
 LAW AND FACT, 2, 3.
 LIMITATIONS, 2.
 PLEADING, 1.
 PROMISSORY NOTES, 3, 4.
 REPLEVIN.
 SALE, 1.

EVIDENCE.—*Continued.*

See TRESPASS QUARE CLAUSUM FREGIT.

TRUSTS AND TRUSTEES.

EXECUTION.

Where a sheriff, having informed the plaintiff at the time of a levy, under a *fi. fa.* that unless he would indemnify him, he would not sell—upon motion made at the return term of the writ, the Court granted a rule absolute either to indemnify the sheriff, or permit him to enlarge the time of making his return, from term to term, until that was done; and again enlarged the time for making his return to the first day of the next term. *Jessop vs. Brown*, 245.

EXECUTORS AND ADMINISTRATORS.

1. Where it was *held*, in an action of replevin by the administrator *d. b. n.* of W., brought after the death of the latter's widow, who had been appointed W's administratrix, to recover a part of W's personal property claimed by the defendant under a mortgage of the same to him from the said widow and some of W's children, that inasmuch as strong circumstances existed in the case, to induce the presumption that the intestate's debts had been all satisfied, it was fair to infer that the administratrix had made distribution of the remaining assets, and acted in her character of distributee, in making the mortgage; that therefore the plaintiff was not entitled to recover. *Allender vs. Riston*, 52.
2. The answer of an executor or administrator in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule, that an answer asserting a fact responsive to the bill can only be disproved or outweighed by the testimony of two witnesses, or one, with pregnant circumstances. *Pennington vs. Gittings*, 123.
3. When an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions, and his speaking positively cannot alter the character of his testimony; merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. *Ib.*
4. The confession of a judgment by an executor is conclusive on him, as well as to the debt confessed, as to the sufficiency of the assets to pay it; but in relation to his surety, in his testamentary bond, it is only *prima facie* evidence, either as to the debt, or sufficiency of assets to pay it. *Iglehart vs. State*, 146.
5. G. as administrator of A. took possession of various articles of personal property left by her, part of which she held as executrix of H., and sold them. Some years after this, letters of administration *d. b. n.* upon H's estate were granted to S. who brought trover against G. for that part of the property which had originally belonged to H. *Held*, that although S. was present at such sale and purchased some of the articles, yet he was not precluded thereby from recovering from G. for this conversion. *Glenn vs. Smith*, 296.
6. Letters testamentary or of administration granted in another State, give no authority to sue, or to administer assets in this State; and

EXECUTORS AND ADMINISTRATORS.—*Continued.*

will not exempt a party from liability, in an action by the rightful administrator here, though distribution be made in conformity to such letters. *Ib.*

7. There are acts of intermeddling, such as locking up the goods of a deceased person for safe-keeping, which will not charge a man as executor of his own wrong. *Ib.*
8. The taking the goods of an intestate by a stranger, and using or selling them, and in general any intermeddling with them, will, as respects creditors, make him an executor *de son tort*, and chargeable with the debts of the deceased, so far as assets come to his hands. *Ib.*
9. As against creditors an executor *de son tort* is justified in paying the debts of the deceased; and if sued by such he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot in any case, retain any part of the goods of the deceased in satisfaction of his own debt. *Ib.*
10. In trover by a rightful executor against a wrongful one, for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debt; but under the general issue, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, as when the debts are just, and there is no deficiency of assets. *Ib.*

See BOND, 8, 9.

EQUITY, 6.

EVIDENCE, 4, 10.

GUARDIAN AND WARD.

PLEADING, 2, 3.

PROMISSORY NOTES, 2, 7.

GIFT.

1. The gift by a father to his child of a certificate, that the father is entitled to a certain number of shares in the capital stock in a bank "transferable at the said bank only, personally, or by attorney," signed by the cashier of the bank, and endorsed in blank by the father will not sustain a bill in equity by the donee against the executor of the donor, praying for a transfer of the stock mentioned in the certificate. *Pennington vs. Gittings*, 122.
2. Neither a *donatio inter vivos*, nor a *donatio mortis causa*, can be by mere parol. The rule of law in either case is, that a delivery of the thing intended to be given, is essential to the perfection of the gift. *Ib.*
3. The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by the donor, with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus poenitentiae*, (which must be the case, where he retains the possession, and what is done, is merely by parol,) there cannot be a perfect and legal donation. *Ib.*

GIFT.—*Continued.*

4. A gift which is not good and valid at law, cannot be made good in equity. *Ib.*

GUARANTY.

1. L. upon an award in his favor, wrote the following order: "M. will please pay D. or order, the above award of \$289, with interest, which sum I guarantee to said D. for value received, this 10th September, 1822, L." In October, 1822, D. presented the order to M. which was not paid. In August, 1824, he obtained judgment upon the award against M. who at that time was and ever since has been insolvent. In November, 1823, D. informed L. of M's failure, and required payment of L. which was refused. In June, 1824, D. sued L.—*Held*, that he could not recover. *Per* FREDERICK COUNTY COURT. *Davis vs. Leab*, 186.

GUARDIAN AND WARD.

1. I. and P. were joint executors of W. who left a son, for whom I. was also appointed guardian. In an action brought by the administrator of that son on the guardian's bond, against one of I's sureties, it appeared that many years before the commencement of the suit, the joint executors had received a considerable amount of assets, but had not settled any account with the Orphans' Court, and that P. was dead: *Held*, that I's guardianship ceased with the death of his ward, and as it did not appear that he died after P. and after I. became sole executor, the action could not be sustained. *Watkins vs. Wells*, 136.
2. Where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property in his hands, to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a final account has been passed by the Orphans' Court, or not. *Ib.*
3. But where there is a joint executorship, this construction of law cannot consistently with principle prevail: because his co-executor is entitled to the possession of the assets equally with the guardian, and the property of his ward cannot be legally considered in his hands, until he has actually received it. *Ib.*

HEIR.

See EQUITY, 2.

HUSBAND AND WIFE.

Upon a petition by several heirs-at-law, certain real estate in which they were jointly interested, and which was not susceptible of a beneficial division among them, was decreed to be sold. A trustee was appointed; the land sold; and a report of the trustee, stating the proceeds of sale to be in his hands, was ratified and confirmed by the Court. Before the auditor had distributed these proceeds among the heirs, one of them who was a married woman, died. *Held*, That her surviving husband was entitled to her distributive share of the sale. *Hammond vs. Stier*, 50.

See EQUITY, 1.

INFANT.

See EQUITY, 12.

INSURANCE.

1. Orders for, and contracts of insurance are to be liberally construed, and with reference not only to the situation and circumstances of the subject-matter of insurance, but also of the parties by whom the insurance is effected. *Allegre vs. Maryland Ins. Co.* 86.
2. So an application for insurance from Rio de la Plata to Havana, which stated "said vessel will sail from La Plata in the course of this month," made by a merchant in Baltimore, to an insurance company there, is not to be regarded as a technical representation of the time of the vessel's departure, but as a statement merely of the belief, or opinion of the applicant, that she would sail at the time mentioned. *Ib.*
3. In an action on a policy of insurance, the question, whether the risk has been materially increased by the sailing of the vessel on her voyage, at one time, instead of another, ought not to be submitted to the jury, when no testimony whatever had been adduced on the subject, to warrant the jury in drawing such a conclusion. *Ib.*
4. It is competent to offer evidence, whether, according to the custom and usage of insurance companies, the word cargo, in an order for insurance, would be considered as covering live stock. *Ib.*
5. A policy on cargo, or goods and merchandise, will not cover articles which are stowed upon deck. *Ib.*
6. Good faith and fair dealing are the very essence of the contract of insurance, and it is the duty of the assured to communicate every fact which can influence the mind of any prudent insurer in determining whether he will underwrite the policy at all, or at what premium he will underwrite it. *Ib.*
7. The word cargo, in an order for insurance, does not, ordinarily, cover live stock: but if live stock constitute the only article of exportation from the port from which the vessel carrying the insured property is to sail, to the port to which she is destined; or if, according to the mercantile usage of the place of effecting the insurance, the word cargo is understood to cover live stock, then an insurance under that general denomination, will cover live stock. *Ib.*
8. The existence of such usage, when evidence is offered for and against it, is a question exclusively for the jury. *Ib.*
9. Uniformity of decision among the several States of the Union, on questions connected with contracts of insurance, is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce the sanction of principles established in the other States. *Ib.*
10. Where actions upon two policies of insurance for the same voyage, one upon the cargo, the other upon the vessel, were tried before the same jury at one time, proof that the word cargo, in the one policy, did not, according to the mercantile interpretation and usage of the place where the policies were effected, cover a shipment of mules, is not evidence that the other policy on the vessel is a nullity. A perilous cargo to the insurer does not necessarily, increase the perils of the ship-owner. *Chesapeake Ins. Co. vs. Allegre*, 99.
11. It is true, as a general rule, that in an order for insurance upon a vessel, it is, not necessary to state the nature or condition of the

INSURANCE.—*Continued.*

cargo designed to be transported. If the underwriters desire information upon that subject, it is for them to ask it. *Ib.*

12. In such case, the underwriter is presumed to be acquainted with the ship-owner's rights. In the absence, therefore, of fraud, or evidence to vary the general rule, the payment of a loss under the policy, cannot be resisted upon the ground that a larger premium would have been required for the insurance of a vessel employed in transporting mules, than was stipulated to be paid under a contract which did not mention the nature of the cargo. *Ib.*

See CONTRACT, 1.

INTEREST.

See BOND, 10.

JUDGMENT.

See EXECUTORS AND ADMINISTRATORS, 4.

LANDLORD AND TENANT.

1. Mere continuance in a possession, which originated under a lease from the Lord Proprietary of this State, created in conformity to the Act of 1704, ch. 16, sec. 5, after the reversioner is entitled to re-enter for a condition broken, and before the original term had expired by lapse of time, is not adverse to the reversioner's right to re-enter, nor will limitation begin to run under such circumstances. *Gwynn vs. Jones*, 104.
2. Where a possession commenced rightfully, and with the consent of the owner, nothing is to be presumed to make it adverse. Mere holding over, after the term ended, is not evidence of an adverse possession; and the possessor will be regarded as the tenant at will of the landlord, unless he can show that, since the expiration of the lease, he has held forcibly, or has acquired a title paramount to that under which possession was originally taken. *Ib.*

See ASSUMPSIT, 1.

EVIDENCE, 10.

LARCENY.

See CRIMINAL LAW, 3.

LAW AND FACT.

1. Where, in an action by an agent for the recovery of compensation for his services, it was *held*, that it was properly left to the jury to determine whether there was any new contract between the plaintiff and the defendant,—who was the representative of one of the plaintiff's principals,—after the death of said principal, by which the defendant would be liable in his individual capacity. *Stiles vs. Causten*, 29.
2. Where there is any legal admissible evidence, tending to prove the issue in a cause, the effect of that evidence is solely for the consideration of the jury. *Davis vs. Barney*, 281.
3. When there is no evidence applicable to the issue, or tending to prove any material fact, there is a total failure of evidence, the Court will direct the jury accordingly. *Ib.*
4. Where, the County Court having decided that the whole evidence in a case before it did not furnish competent proof of a certain matter,

LAW AND FACT.—*Continued.*

it was, upon appeal, *held*, that this was a question of fact for the jury. *Barger vs. Collins*, 248.

See BOND, 10.

CONTRACT, 4.

INSURANCE, 8, 8.

LIEN.

See EQUITY, 1.

LIMITATIONS.

1. The acknowledgment of a defendant, that the promissory note upon which he was sued as maker, was originally given to close an account, which the payee and plaintiff had against the vestry of a church, of which he, the defendant was a member; and that the money arising from the pew rents was to have been applied to the payment of the same, but that it never had been paid, is not sufficient to take the case out of the Statute of Limitations. It shews that there never was an existing debt due from the defendant; and that when the note was given, it was not to be paid by him, but out of the money arising from the pew rents, which exempts him from any moral obligation to pay. *Rogers vs. Waters*, 40.
2. Where a plaintiff gives in evidence a letter from the defendant, to avoid the Statute of Limitations, he must take the letter as it is. *Ib.*
3. W. in March, 1827, filed a bill against the administrators of H. who died in 1826, for an account and distribution of his personal estate. After the coming in of the answers, and the cause had been referred to the auditor, the administrators filed with the auditor, as a set-off to W's claim for a distributive share, a mortgage, from her to the deceased of personal property to secure the payment of a debt, containing a covenant for its payment on or before the 1st January, 1810. *Held*, that the plea of limitations was a bar to this mortgage. *Watkins vs. Harwood*, 189.
4. By the Act of 1715, ch. 23, the Act of Limitations of this State the recovery of a debt due by specialty is barred after a lapse of twelve years. *Ib.*
5. It is a settled principle that Chancery follows the law; and acting in obedience to the statute, the plea of limitations is as available in equity as at law, in relation to the same subject-matter. *Ib.*

See BOND, 8.

DOWER, 8.

PROMISSORY NOTES, 4.

LOTTERY.

See CRIMINAL LAW, 1, 2.

MORTGAGE.

1. A mortgage omitted to be recorded in due season from no fraudulent design, will, under the Act of 1785, ch. 72, sec. 11, be decreed to be recorded, saving the rights of subsequent purchasers without notice of its existence; and upon a bill filed by the mortgagee, a sale of the mortgagor's interest at the time of its execution, will also be decreed with a like saving. *Sprigg vs. Lyles*, 270.
2. A mortgagee solicited a third party to purchase land, mentioned in his unrecorded mortgage, at sheriff's sale, under a judgment against

MORTGAGE.—*Continued.*

the mortgagor, obtained after its execution, and for which, in fact, the mortgagee was responsible as surety. At the sale, notice of the mortgage was publicly given. The object was to obtain the land at a low price for the mortgagor and his family; but the scheme being defeated, and the party solicited having given full value for the land, such mortgage cannot be recorded without saving his rights. *Ib.*

3. Where the security which an unrecorded mortgage gives to a debt, has been abandoned for other security given by the debtor, and accepted by the creditor, such mortgage will not be decreed to be recorded. *Ib.*

See DOWER, 1.

EQUITY, 1.

EXECUTORS AND ADMINISTRATORS, 1.

PAYMENT.

See PROMISSORY NOTES, 7, 8, 9, 10, 11.

PLEADING.

1. Where it was *held*, in an action by a vestry of a church to recover the price of a pew, that it was unnecessary for the plaintiffs to shew their title to the pew. *Stoddert vs. Vestry*, 140.
2. G. obtained judgment by confession against W. as executor, who thereupon stayed execution by a writ of error and bond. While the case was pending in the Appellate Court, the executor died, and the writ of error was abated. The executor, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *d. b. n.* of the first deceased, did not find assets sufficient to discharge the debt. In an action upon W's testamentary bond, against his surety, for the use of G. a replication disclosing the above facts, was held sufficient on general demurrer and a compliance with the Act of 1720, ch. 24. *Iglehart vs. State*, 146.
3. In this case the defendant rejoined, "that the said executor had no goods or chattels which were of the deceased testator, at the time of his death in his hands to be administered, nor had at any time thereafter:" *Held*, on demurrer, that this rejoinder could not be received as a general plea, extending over the whole time from the death of the testator to the death of the executor, that no goods of the deceased ever came to the executor's hands—that it could only be considered as a plea of *plene administravit*, or a substitute for such a plea, and as such, it was materially defective. *Ib.*
4. Upon general demurrer, it is the duty of the Court to look to, and adjudicate upon all the pleadings in the cause. *Ib.*
5. Where a plea contains matters of fact, as well as matters of record, it should not conclude with a verification by the record, but with a verification to the country. *Karthauss vs. Owings*, 261.
6. A plea in bar must be a substantial and conclusive answer to the action. *Ib.*

See BANKRUPTCY AND INSOLVENCY, 1, 2, 3.

BOND, 10.

EQUITY, 4, 5, 10.

EXECUTORS AND ADMINISTRATORS, 2, 3, 9, 10.

PRACTICE.

See ARBITRATION AND AWARD.

PRINCIPAL AND AGENT.

See CORPORATION.

LAW AND FACT, 1.

PROMISSORY NOTES.

1. A promissory note given by a member of the vestry of a church, for a debt due, not by him in his individual character, but by the vestry, a corporate body, of which he was a member, without any consideration moving to himself, is a promise to pay the debt of another, without consideration, and void. *Rogers vs. Waters*, 40.
2. The fact, that a note was payable at a future day, where it appeared that it was made for the purpose of closing an account, for which the maker was not responsible independent of the note, does not furnish the slightest presumption that forbearance was purchased by it; for nothing is more common than the closing of accounts by passing notes payable at future days, without the consideration of forbearance being thought of. *Ib.*
3. Where the agent of an endorsee, the holder of a promissory note, called upon the maker for the payment of the note, and the maker offered to pay the same in goods, which the agent declined receiving, having authority only to accept money, it is unnecessary in an action upon the note to prove either the hand-writing of the maker or previous endorser; as the offer to pay the agent, amounted to an admission that everything had been done necessary to the endorser's right to receive the money; that there was no objection to his paying the note, and superseded the necessity of further proof. *Keplinger vs. Griffith*, 182.
4. Where in an action by the endorsee against the maker of a promissory note, negotiated before maturity, certain evidence was held to be a sufficient answer to the plea of limitations. *Ib.*
5. In an action on a promissory note, by S. the endorser against D. the maker, where payment to S. had been made by R. who, it appeared, was entitled to the beneficial interest in said note, *held*, that as the payment to S. was not made by D. or on his behalf, that the suit could be carried on for R's benefit as the equitable assignee. *Williamson vs. Allen*, 210.
6. A promissory note may be purchased without taking an endorsement as well after, as before suit brought. The purchaser has the beneficial, and the vendor the legal interest: and the suit may be carried on without entering the use. *Ib.*
7. Where it was *held*, that the acceptance by I. of certain promissory notes given him by A., the executrix of H. who had died indebted to I., was not an extinguishment of the debt due him by H.: that A. having died before the maturity of said notes, and M. her executor having paid the same, this payment by G. was therefore, the payment of H's debt, and entitled him to deduct that payment from the proceeds of H's personal property sold by him. *Glenn vs. Smith*, 296.
8. The acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt, if it remains in the hands of the creditor unpaid, and he can produce it to be cancelled, or show it to be lost. But the creditor

PROMISSORY NOTES.—*Continued.*

will not be suffered to recover on the original cause of action, unless he can show the note to have been lost, or produces it at the trial, to be cancelled. *Ib.*

9. The acceptance by a creditor, of a note or bill of a third person, for a pre-existing debt, is no payment or extinguishment of such debt, unless the creditor parts with it, or is guilty of laches in not presenting it for payment in due time. *Ib.*
10. In either of the above cases, an express agreement by the creditor to receive the note or bill absolutely as payment, and to run the risk of its being paid, is an extinguishment of the previous debt, whether the note or bill be afterwards paid or not. Such agreements are not to be implied from the use of the words, "in payment of the above account," in a receipt for the note. *Ib.*
11. To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shewn. *Ib.*
12. The acceptance of a note by a creditor for a precedent debt, is a suspension of his right of action until the note reaches maturity. *Ib.*

See LIMITATIONS, 1.

PUBLIC OFFICER.

See BOND, 7.

CONSTITUTIONAL LAW, 3.

RECEIVER.

See EQUITY, 10.

REGISTER IN CHANCERY.

See BOND, 5.

CONSTITUTIONAL LAW, 1.

EVIDENCE, 9.

REPLEVIN.

The appraisers authorized in the case of rent by the Statute Geo. 2, have in practice been resorted to in all cases of replevin in this State, for the purpose of ascertaining the value of the goods replevied; their appraisement is *prima facie* evidence of the value of goods taken. *Karthus vs. Owings*, 261.

See BOND, 10.

EVIDENCE, 5.

EXECUTORS AND ADMINISTRATORS, 1.

SALE.

1. Every fair legal presumption ought to be allowed in favor of a judicial sale, where the purchase money has been *bona fide* paid. *Shilknecht vs. Eastburn*, 71.
2. Where it was *held*, that the jury might, and ought, to presume that the return of a trustee's sale, as reported by him had been finally ratified and confirmed. *Ib.*

See CONTRACT, 7.

HUSBAND AND WIFE.

SET-OFF.

See ACTION.

STATUTE OF FRAUDS.

See CORPORATION.

EQUITY, 8.

STATUTES.

I. CONSTRUCTION AND EFFECT.

Statutes are sometimes extended to cases not within the letter; and cases are sometimes excluded from the operation of statutes though within the letter; on the principle that what is within the intention of the maker of a statute, is within the statute, though not within the letter, and that what is within the letter of the statute, and not within the intent of the maker, is excluded, it being an acknowledged rule in their construction, that the intention of the maker ought to be regarded. *State vs. Boyd*, 223.

II. BRITISH STATUTES.

— Geo. 2, c. — *Karthauss vs. Owings*, 261.

III. ACTS OF ASSEMBLY.

- 1704, c. 16. *Gwynn vs. Jones*, 104.
- 1715, c. 23. *Watkins vs. Harwood*, 189.
- 1720, c. 24. *Iglehart vs. State*, 146.
- 1729, c. 24. *State vs. Boyd*, 223.
- 1742, c. 10. *Wayman vs. State*, 156.
- 1785, c. 72. *Spriggs vs. Lyles*, 270.
- 1785, c. 80. *Price vs. Tyson*, 288.
- 1786, c. 45. *Wells vs. Beall*, 278.
- 1796, c. 14. *Gwynn vs. Jones*, 104.
- 1798, c. 101. *State vs. Boyd*, 223.
- 1820, c. 161. *Purviance vs. Barton*, 191.
- 1825, c. 117. *Davis vs. Leab*, 186.
- 1826, c. 251. *State vs. Scribner*, 152.

SURETY.

See BOND, 2.

EXECUTORS AND ADMINISTRATORS, 4.

PLEADING, 2.

TAXES.

In the collection of taxes imposed upon real estate within the City of Baltimore, for the year 1821, the ordinances of that city imposing them, having referred to the laws of the State, for the manner of collecting them, the land can never be sold for their payment, unless the collector can find no personal property liable for the payment of the tax. If personal property can be found, it must be made liable in the first instance. *Mayor, &c. of Balto. vs. Chase*, 227.

See EQUITY, 10.

TENANCY IN COMMON.

See DEED, 4.

TRESPASS QUARE CLAUSUM FREGIT.

1. In an action of trespass *q. c. f.*, held, that where it does not appear, either from the plots themselves, or the surveyor's explanations, what was the object or design of certain lines upon plots returned under a warrant of resurvey, nor from the surveyor's certificate, that he had ever made such locations, it is not competent to shew,

TRESPASS QUARE CLAUSUM FREGIT.—*Continued.*

that the surveyor laid down such lines for a counter-location of a tract of land described in the plots; for such lines are a mere nullity. *Mundell vs. Perry*, 115.

- 2 If testimony, out of the plots and explanations filed with them, could be received to give name and character to unintelligible locations, it would defeat the object for which plots have been received as part of the pleadings in the cause. *Ib.*
- 3 The object and intention of introducing plots in the cause, is to give certainty to the claim and defence, and to apprise the parties, that the locations of other lands are to be used, to illustrate, and support, the location of those under which they claim title. It is to prevent surprise, and therefore it has been the uniform practice of the Courts, to reject evidence as to any object, unless it is located on the plots. *Ib.*

TROVER.

See EXECUTORS AND ADMINISTRATORS, 5, 10.

TRUSTS AND TRUSTEES.

The law will always lean to the presumption that a trustee has faithfully executed his trust. *Shilknecht vs. Eastburn*, 71.

See BANKRUPTCY AND INSOLVENCY, 1, 2, 3, 4, 5.
SALE, 2.

USAGE AND CUSTOM.

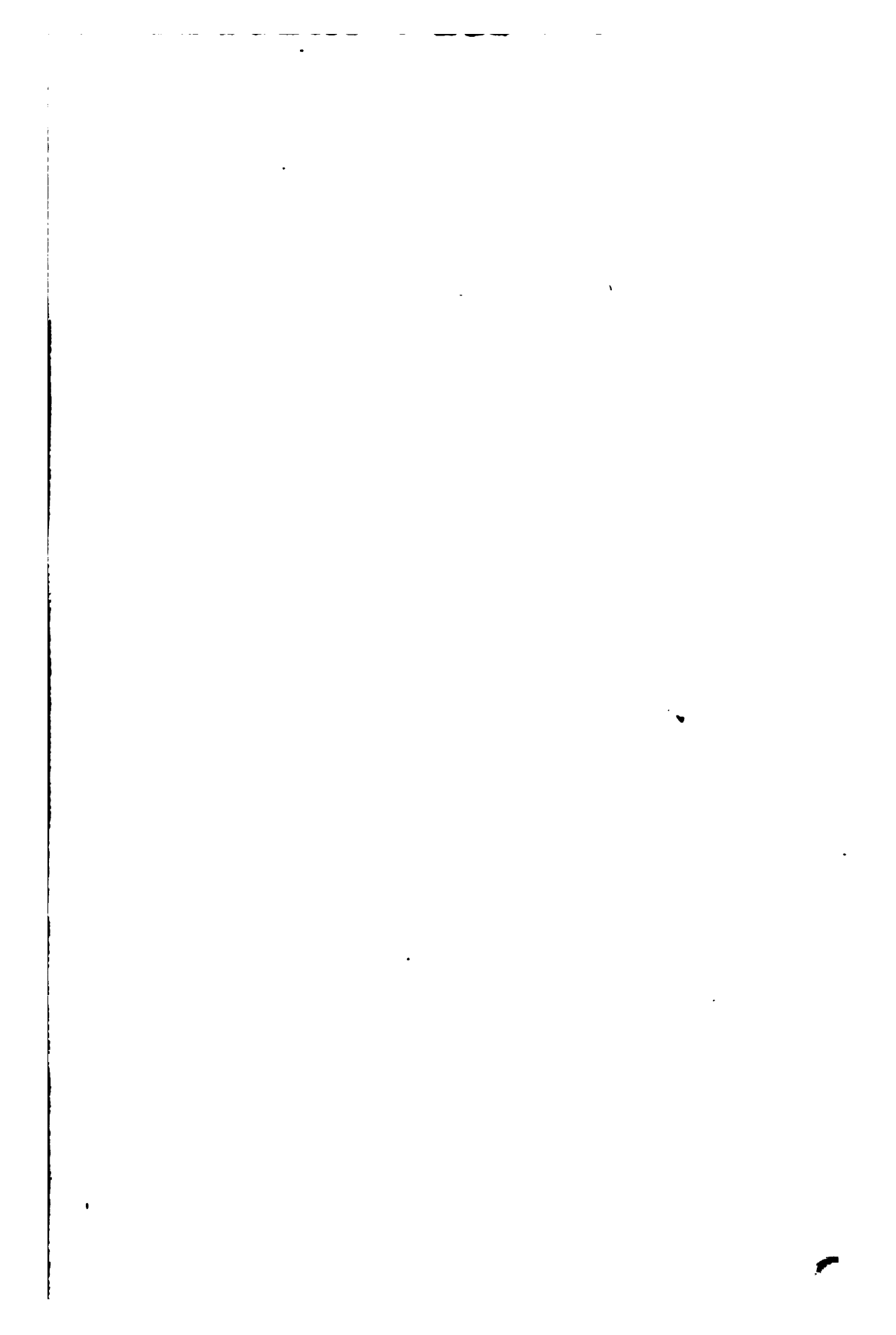
See INSURANCE, 4, 7, 8, 10.

WILLS.

1. D. by last will, devised as follows: "Item. I give and bequeath to my two grandsons, S. and W. sixty dollars each; and all the rest and residue of my personal estate, I give to be equally divided among my five sons." He also devised his real estate to his widow, and after her death, or marriage, directed his executors to sell it, and divide the proceeds among his sons. The testator's personal estate being insufficient to pay his debts, and also the pecuniary legacies, one of the grandsons, after the widow's death, filed a bill to have the land sold for the payment of his legacy. *Held*, That he was not entitled to relief. *Simmons vs. Drury*, 19.
2. Where it was *held*, that upon the true construction of a certain will, G. who was named in said will as the testator's "sole heiress," was entitled to the whole of his personal estate. *Siemer vs. Siemer*, 62.
3. A testator directed the whole of his real and personal estate, not specifically devised, to be sold on credit by his executors, and the proceeds applied to the payment of his debts and legacies. At the time of making his will, and at his death, he was indebted to E. one of his pecuniary legatees, to whom he devised a greater sum than he owed. In an action by E. against the executors to recover the debt due to her from the testator, *held* that her legacy was not to be taken as a satisfaction of the debt due her. *Edelen vs. Dent*, 112.
4. The general rule of law that a pecuniary legacy, of an equal, or a larger amount, is to be taken as a satisfaction of a debt, is undeniable: but it is not an unbending rule, and not being much favored, is made to yield to slight circumstances. *Ib.*

WILLS.—*Continued.*

5. An express devise for the payment of debts and legacies—the creation of a fund for the payment of debts, and a charge of the legacy on that fund—if the legacy be uncertain, and made to depend upon a contingency—if the payment of the legacy be postponed by the will to a time subsequent to that, at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time, are each cases in which a legacy will not be considered as a satisfaction of the testator's debt. *Ib.*
6. A devise to "A. and the heirs of his body, lawfully begotten," since the Act of 1786, constitutes an estate in fee simple. A remainder, limited to take effect upon the determination of such an estate, is inoperative. *Wells vs. Beall*, 278.



REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland,

AND IN THE
HIGH COURT OF CHANCERY OF MARYLAND,

FROM
FIRST HARRIS & McHENRY'S REPORTS TO FIRST
MARYLAND REPORTS.

ANNOTATED BY
WILLIAM T. BRANTLY,
OF THE BALTIMORE BAR.

VOLUME XVI.
CONTAINING THE THIRD VOLUME OF GILL & JOHNSON'S REPORTS.

BALTIMORE:
M. CURLANDER,
LAW BOOKSELLER, PUBLISHER AND IMPORTER.

1884.

References in the notes to preceding volumes of Maryland Reports are made to the pages of this edition.

The Index and Table of Cases in each volume of this series after 1 H. & J. have been prepared by Mr. W. H. BRUNE, JR., of the Baltimore Bar.

This volume, containing cases determined in the Court of Appeals of Maryland in 1830-32, and reported by Richard W. Gill, Attorney-at-Law, and John Johnson, Clerk of the Court of Appeals, was first published at Baltimore, by Wm. and Jos. Neal, in 1832.

BALTIMORE:
WM. K. BOYLE & SON,
PRINTERS.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, Judge.
Hon. JOHN STEPHEN, Judge.
Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.

COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

COUNTY COURTS.

FIRST JUDICIAL DISTRICT.

Saint Mary's, Charles and Prince George's Counties.

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSBY PLATER, Associate Judge.

SECOND JUDICIAL DISTRICT.

Cecil, Kent, Queen Anne's and Talbot Counties.

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. PHILEMON B. HOPPER, “ “

THIRD JUDICIAL DISTRICT.

Calvert, Anne Arundel and Montgomery Counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, “ “

FOURTH JUDICIAL DISTRICT.

Caroline, Dorchester, Somerset and Worcester Counties.

Hon. WILLIAM BOND MARTIN, Chief Judge.

Hon. ARA SPENCE, Associate Judge.

Hon. WILLIAM TINGLE “ “

FIFTH JUDICIAL DISTRICT.

Frederick, Washington and Allegany Counties.

Hon. JOHN BUCHANAN, Chief Judge.

Hon. ABRAHAM SHRIVER, Associate Judge.

Hon. THOMAS BUCHANAN, “ “

SIXTH JUDICIAL DISTRICT.

Baltimore and Harford Counties.

Hon. STEVENSON ARCHER, Chief Judge.

Hon. CHARLES W. HANSON, Associate Judge.

Hon. THOMAS KELL, “ “

BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. WILLIAM McMECHEN, Associate Judge.

Hon. ALEXANDER NISBET, “ “

ATTORNEYS-GENERAL.

JOSIAH BAYLEY, Esquire, appointed Attorney-General of Maryland, 22nd of July, 1831, *vice*

ROGER B. TANEY, Esquire, resigned, and appointed Attorney-General of the United States.

TABLE OF CASES.

REPORTED IN 3 GILL AND JOHNSON'S REPORTS.

References are to top pages.

Archer <i>ats.</i> Hoxton.....	128
Arnold <i>vs.</i> Cost.	188
Ayres <i>vs.</i> Kain.....	18
Baltzell <i>ats.</i> Hysinger.....	99
Barnes <i>ats.</i> Hanson.....	217
Belt <i>vs.</i> Worthington.....	155
Blessing <i>vs.</i> House.....	178
Blizzard <i>vs.</i> Jacobs.....	48
Boehme <i>ats.</i> Finley.....	31
Bosley <i>vs.</i> Chesapeake Ins. Co.....	279
Bourne <i>ats.</i> Hungerford.....	85
Brewer <i>ats.</i> Hoye.....	96
Carey <i>vs.</i> Klinefelter.....	210
Carroll <i>vs.</i> Lee.....	313
Carroll <i>vs.</i> Waring.....	304
Chesapeake Ins. Co. <i>ats.</i> Bosley.....	279
City Bank, &c. <i>vs.</i> Smith.....	165
Cockey <i>vs.</i> Forrest.....	302
Collinson <i>ats.</i> Owens.....	19
Cooper <i>ats.</i> McNulty.....	135
Cost <i>ats.</i> Arnold.....	138
Cowman <i>vs.</i> Hall.....	245
Dent <i>ats.</i> State.....	6
De Young <i>ats.</i> McLaughlin.....	4
De Young <i>ats.</i> Richmond.....	41
Diffenderffer <i>vs.</i> Winder.....	189
Dorsey <i>ats.</i> State.....	47
Dowell <i>ats.</i> State.....	188
Ellicott <i>ats.</i> Stockett.....	78

Everhart <i>ats.</i> Trasher.....	145
Finley <i>vs.</i> Boehme.....	31
Flack <i>vs.</i> Green.....	296
Flack <i>ats.</i> Penn.....	224
Forrest <i>ats.</i> Cockey.....	302
Fridge <i>vs.</i> State.....	64
Gaither <i>vs.</i> Welch.....	161
Garrett <i>ats.</i> Watts.....	214
Gibson <i>ats.</i> McCormick.....	10
Glasgow <i>vs.</i> Sands.....	59
Glenn <i>ats.</i> Hall.....	245
Godfrey <i>ats.</i> Thomas.....	89
Green <i>vs.</i> Johnson.....	238
Green <i>ats.</i> Flack.....	296
Hall <i>ats.</i> Cowman.....	245
Hall <i>vs.</i> Glenn.....	245
Hamilton <i>vs.</i> Jones.....	81
Hanson <i>vs.</i> Barnes.....	217
House <i>ats.</i> Blessing.....	178
Hoxton <i>vs.</i> Archer.....	128
Hoye <i>vs.</i> Brewer.....	96
Hungerford <i>vs.</i> Bourne.....	85
Hysinger <i>vs.</i> Baltzell.....	99
Jacobs <i>ats.</i> Blizzard.....	43
Jameson <i>ats.</i> State.....	274
Johnson <i>ats.</i> Green.....	238
Jones <i>ats.</i> Hamilton.....	81
Jones <i>ats.</i> Richardson.....	104
Kain <i>ats.</i> Ayres.....	18
Klinefelter <i>vs.</i> Carey.....	210
Kolb <i>vs.</i> Whitely.....	121
Lee <i>ats.</i> Carroll.....	313
McCormick <i>vs.</i> Gibson.....	10
McLaughlin <i>vs.</i> De Young.....	4
McNulty <i>vs.</i> Cooper.....	135
Moats <i>vs.</i> Witmer.....	75
O'Neale <i>ats.</i> Yates.....	158
Owens <i>vs.</i> Collinson.....	19
Owings <i>vs.</i> Owings.....	1

TABLE OF CASES.—3 G. & J.

vii

Peach <i>ats.</i> Waters.....	251
Penn <i>vs.</i> Flack	224
Richardson <i>vs.</i> Jones.....	104
Richmond <i>vs.</i> De Young.....	41
Roberts <i>vs.</i> Salisbury.....	268
Robinson <i>vs.</i> Townshend.....	254
Salisbury <i>ats.</i> Roberts.....	268
Sands <i>ats.</i> Glasgow.....	59
Scharff <i>ats.</i> State.....	59
Sibley <i>vs.</i> Williams.....	87
Smith <i>ats.</i> City Bank, &c.....	165
Sothoron <i>vs.</i> Weems.....	269
State <i>vs.</i> Dent.....	6
State <i>vs.</i> Dorsey	47
State <i>vs.</i> Dowell.....	188
State <i>ats.</i> Fridge.....	64
State <i>vs.</i> Jameson.....	274
State <i>vs.</i> Scharff.....	59
Stewart <i>vs.</i> Stone.....	318
Stimmel <i>vs.</i> Underwood..	174
Stockett <i>vs.</i> Ellicott.....	78
Stone <i>ats.</i> Stewart.....	318
Thomas <i>vs.</i> Godfrey.....	89
Townshend <i>ats.</i> Robinson.....	254
Trasher <i>vs.</i> Everhart.....	145
Turner <i>vs.</i> Walker.....	231
Underwood <i>ats.</i> Stimmel.....	174
Walker <i>ats.</i> Turner.....	231
Waring <i>ats.</i> Carroll.....	304
Waters <i>vs.</i> Peach.....	251
Watts <i>vs.</i> Garrett.	214
Weems <i>ats.</i> Sothoron.....	269
Welch <i>ats.</i> Gaither.....	161
Whitely <i>ats.</i> Kolb.....	121
Wilson <i>vs.</i> Wilson.....	15
Williams <i>ats.</i> Sibley.....	37
Winder <i>ats.</i> Diffenderfer.....	189
Witmer <i>ats.</i> Moats.....	75
Worthington <i>ats.</i> Belt.....	155
Yates <i>vs.</i> O'Neale.....	158

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

* DECEMBER TERM, 1830.

1

OWINGS *et al.* vs. OWINGS.—December, 1830.

An appeal from a decree of the Chancellor cannot properly be taken, after the death of the only complainant in the cause, in the name of such complainant; and neither the appearance of the representatives of the deceased party, after a suggestion of the death in the Appellate Court, nor the appearance of the other party there, cures the defect. The Court on motion dismissed such an appeal. (a)

(a) In *Harryman vs. Harryman*, 49 Md. 70, the Court said that in the case in the text "it was held that no appeal could be taken from a decree of the Chancellor, after the death of the only complainant in the cause, in the name of such complainant; and that neither the appearance of the representatives of the deceased party, after proof of death in this Court, nor the appearance of the other party cured the defect; and the appeal was dismissed. And the principle of that case was re-affirmed in *Carroll vs. Bowie*, 7 Gill, 34; but in the latter case it was the death of the appellee which occurred during the pendency of the appeal in this Court, and was suggested after rule argument, that gave rise to the question whether the appeal could be further prosecuted; and it was held that the case was embraced with the common law rule, before referred to, as to defendants in error, and consequently there was no abatement or failure of the appeal. But here, the defendant having died before the appeal was taken, he never was a party to the appeal, and there is no statute that applies to the case, or that gives this Court power to entertain the appeal taken under such circumstances. It may be that the appellant can reach the justice of the case by a bill of revivor and review for errors apparent on the face of the proceedings; but there is no power here to review and reverse or affirm the decree appealed

The Act of 1785, ch. 80, sec. 1, (to prevent the abatement of actions) does not apply to causes in the Appellate Court.

The Acts of 1806, ch. 90, sec. 11, and 1815, ch. 149, secs. 5, 6, relate to causes in the Court of Appeals, but neither of them relates to an appeal prayed from Chancery in the name of a deceased person.

APPEAL from the Court of Chancery. Motion to dismiss the appeal.

In this case a bill was filed on the 21st of May, 1825, by Colegate D. Owings, against the appellee, Charlotte C. D. Owings.

On the 20th February, 1828, BLAND, C. decreed in favor of the defendant, from which decree an appeal was taken to the then ensuing June Term of the Court of Appeals, in the name of the complainant, Colegate D. Owings.

The facts of the case are sufficiently stated by the Judge who delivered the opinion of this Court.

2

*The motion was argued before BUCHANAN, C. J., MARTIN and STEPHEN, JJ.

Johnson, for the appellant. By the appearance of the appellee, the objection to the irregularity of the appeal is waived.

If the appellee had not appeared, the appeal would have been discontinued, and a new appeal taken within the time required by law, by the proper parties. That time having now elapsed, the appellants are without remedy, if the present appeal is dismissed. He referred to the Acts of 1806, ch. 90, sec. 11, and 1815, ch. 149, sec. 5, 6.

Scott, supported the motion.

BUCHANAN, C. J. delivered the opinion of the Court. This case is brought before us on a motion to dismiss the appeal.

The decree of the Chancellor, which it is sought to have reviewed in this Court, was passed on the 20th February, 1828, in favor of the defendant. From that decree, an appeal was prayed by the solicitor

from, and the appeal must be dismissed." In *Thomas vs. Thomas*. 57 Md. 509, the Court approved the construction of the Act of 1815, (Rev. Code. Art. 71, sec. 31,) made in the case in the text, and said that, when the appellee dies before the transmission of the record, there is no statutory provision authorizing the making of new parties by process to be issued out of the Appellate Court. "The appellant was, however, not without remedy: ample power was conferred on the Circuit Court on her application, after the decree was passed, and the death of N. T. occurred, to issue the proper process against the executor, devisees and other persons interested, making them parties to the cause, to the end that her appeal might be prosecuted against them, and affording them an opportunity to appear and defend the same in the Court of Appeals. This power is conferred on the Circuit Court by Art. 16. sec. 8 of the Code."

for Colegate D. Owings, (who had been complainant in Chancery,) on the 14th of March, 1828, which was allowed, and the record was brought up to the June Term, 1828, when there was an appearance of counsel for Charlotte C. D. Owings, the defendant. At the same term, a motion to dismiss the appeal, appears to have been entered. On the 18th of November, 1828, an affidavit of the death of Colegate D. Owings was filed, in which it is stated that she died on the 1st March, 1828, before the appeal was prayed, and at the June Term, 1829, the heirs-at-law of Colegate D. Owings, appeared in the case to prosecute the appeal.

The motion to dismiss the appeal is founded on the fact, supported by affidavit, that the nominal appellant, Colegate D. Owings, was dead at the time the appeal was prayed, and that the record was improperly brought up; and the question is, whether the objection to the case being entertained has been removed, either by the appearance of * counsel for the defendant, or of the heirs-at-law of Colegate D. Owings? 3

It has been decided in *Roche vs. Johnson and Wife*, by this Court sitting on the Eastern Shore, at June Term, 1806, that cases in this Court are not within the provisions of the Act of 1785, ch. 80, sec. 1. But if it was otherwise, and that Act could be held to relate to suits in this Court, this is not a case to which it could apply. That Act provides against an action abating by the death of either party after suit brought, and authorizes the appearance of those interested, but makes no provision for the case of a suit-brought in the name of a dead person.

The Acts of 1806, ch. 90, sec. 11, and 1815, ch. 149, secs. 5, 6, do relate to cases in the Court of Appeals, but neither of them embrace a case such as this. The former of those Acts only providing, that if either of the parties to a cause in the Court of Appeals, shall die, after the cause has been put under rule argument, it shall not therefore abate, but that the Court shall give judgment, as if such deceased party were alive. And the latter providing for the case of the death of an appellant, or plaintiff in error, after an appeal has been made, or writ of error brought, and directing that no appeal or writ of error shall abate, by the death of either party, if the heir, &c. of the deceased party, shall at the first or second term, succeeding the death, make the necessary suggestion, and appear to the appeal, or writ of error for the purpose of prosecuting or defending it; thus clearly not applying to this case, in which the appeal was made in the name of a person, not *in esse* at the time. But if, by any possible construction, it could be held to embrace the case of an appeal made in the name of a dead person, it would not have the effect to save this case; the provision being, that no appeal, or writ of error, shall abate by the death of either party, if the heir, &c. of the deceased party, shall at the first or second term succeeding the death, make the necessary suggestion, and appear, &c. so that the necessary corol-

4 lary is, that the appeal or writ of error, will in * such a case abate, if the heir, &c. of the deceased party shall not at the first or second term succeeding the death make the necessary suggestion, and appear, &c. And not only was there no suggestion of the death in this case, by the heir of the deceased, but the appearance of the heirs was not until the third term after the death. So that if there had been an appeal properly depending in this Court, it would regularly, have abated. But there was no appeal properly made, or depending here, and the mere appearance of the heirs of Colegate D. Owings, does not stand in the way of the motion to dismiss; their appearance being without authority, and the case standing, as if no such appearance had been entered. Nor has the objection been waived or obviated by the appearance of counsel for Charlotte C. D. Owings, which may have been only for the purpose of making the motion to dismiss, and could not have the effect, to render the mere sending up the record, and docketing the case in the name of one who was dead, a good and available appeal.

It was not a mere irregularity, but a complete and radical defect.

Appeal dismissed.

McLAUGHLIN vs. DE YOUNG.—December, 1830.

Y. sued out a writ in trespass upon the case against M. J. R. and S. and filed a declaration, counting upon their note as copartners. M. only was arrested. At the return term of the writ he pleaded as follows: "And the said M. comes and says, that he is in no wise guilty of the trespass aforesaid, as the said Y. above, complains against him; for plea he says, that the said W. R. who in the said writ is called J. R. one of the defendants, is dead, and that he died before the suing out of the said writ of the said M. to wit, at, &c. and this, &c. Whereupon he prays judgment of the writ aforesaid, and that it may be quashed." Held, upon special demurrer, that this was a valid plea in abatement. (a)

A plea in abatement of the writ, is one which shows ground for abating or quashing it, without at the same time denying the right of action itself; and if a plea begins in bar, though it contains matter in abatement, it will be treated as a plea in bar.

5 * An informal or repugnant protestation does not on demurrer, vitiate a plea.

The death of one of the parties named as defendant in a writ, before the impleading of it, is ground of abatement.

APPEAL from Baltimore County Court. These were actions of assumpsit brought by the appellee, Meichel De Young, against Matthew McLaughlin, John Reed and William Simpson, on the 27th July, 1826.

(a) But see Rev. Code, Art. 64, sec. 32.

They were founded on promissory notes, which the defendants were alleged in the declarations to have made as copartners in trade, under the firm of McLaughlin, Reed and Simpson.

The writs were returned by the sheriff, "*cepi*" "Matthew," "*non est*, the rest."

At the return term, the appellant, Matthew McLaughlin, appeared, and filed the following plea: "And the said Matthew comes and says, that he is in no wise guilty of the trespass aforesaid, as the said Meichel above complains against him, for plea he says, that the said William Reed, who in the said writ, is called by the name of John Reed, one of the defendants, is dead, and that he died before the suing out of the said writ of the said Meichel, to wit, at Baltimore County aforesaid, and this he is ready to verify; wherefore he prays judgment of the writ aforesaid, and that it may be quashed, &c."

The plaintiff demurred specially to this plea. 1st. "That it is defective in this, that it concludes by praying judgment of the writ, and that the same may be quashed, &c. whereas, it ought to have concluded by praying judgment, if the Court will proceed any further." 2d. "That in it the said defendant says, that he is in no wise guilty of the trespass aforesaid, and it appears from the proceedings had before the said plea was put in, that the cause of action was in case, sounding in assumpsit, and not in trespass." 3d. "That it is double in this, that it alleges that the said defendant was not guilty of the trespass aforesaid, and also, that the said William Reed, who in the said plea, is called John Reed, died before the suing out of the said writ." * 4th. "That it is both in bar, and abatement." 5th. "That it begins as a plea in bar." 6

The defendant joined in demurrer, and the judgments of the County Court being against him, he prosecuted the present appeals.

The causes were argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Scott, for the appellant.

Gill, for the appellee, referred to 2 *Harr. Ent.* 301; 1 *Chitty's Plead.* 445; 1 *Saund. Plead. Ev.* 13; 1 *Stephens' Plead.* 65, 66; 1 *Chitty's Plead.* 439, 440, 450, 445, 446; 2 *Saund. Rep.* 209 a, (note;) 3 *Term Rep.* 185.

BUCHANAN, C. J. delivered the opinion of the Court. A plea in abatement of the writ, is one which shows ground for abating or quashing it, without at the same time denying the right of action itself; and if a plea begins in bar, though it contains matter in abatement, it will be treated as a plea in bar. But this plea is not obnoxious to the objection raised to it, that it begins in bar. It seems to have been literally copied from a plea of the same kind in *Wentworth*, and although it is headed by the word, "says that he is in no wise guilty of the trespass aforesaid, as the said Meichel above com-

plains, against him," yet they are not to be considered and treated as if introduced as a material part of the plea itself, but only by way of informal protestation, which is clearly shown by the next succeeding words, "for plea says," &c. and in *Story on Pleading*, we find the same plea with the same matter prefixed with this difference only, that it is set out in the shape of a more formal protestation. And

7 it is not a material objection to the plea, either that it is informal, as * a protestation, or that the writ is treated as a writ in trespass, when it appears from the declaration to be an action of assumpsit, a protestation being wholly immaterial, and of no avail in the action in which it is used, but intended only to guard the party against being concluded in another action which it has in view. Hence, a repugnant, inconsistent, idle, or superfluous protestation, does not on demurrer vitiate the plea, whatever its faults of form may be. Treating this then, as an informal protestation, wholly immaterial to the action, and not in other respects vitiating the plea, it does not infect it with duplicity, as is supposed by the demurrer.

The death of one of the parties named as a defendant in the writ, before the impetration of it, is not only proper matter of abatement, but sufficiently pleaded, the words "the said," introduced into the plea, showing William Reed, the person alleged to be dead, and the person named in the writ, John Reed, to be one and the same. And it is clearly no cause of demurrer, that the plea concludes with the prayer, that the writ may be quashed; it is the only proper conclusion of such a plea in abatement, and is not like the case of a plea in abatement, to the person of the plaintiff or defendant, showing a personal disability in one or the other, to sue or to be sued, as that the plaintiff for example, is an alien enemy. Pleas of that character not falling strictly within the definition of pleas in abatement, do not "pray that the writ may be quashed," but "if the plaintiff ought to be answered, &c." But a plea of the character of this, strictly in abatement, showing a ground for quashing the original writ, properly concludes by praying "that the writ may be quashed."

The demurrers to the pleas, ought, we think, to have been overruled, and for that reason

Judgments reversed.

8 * STATE vs. JOHN, alias JACK DENT.—December, 1830.

In an indictment for an assault with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent. (a)

The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done, are considered to be matters of

(a) Cited in *Bode vs. State*, 7 Gill, 332; *Manly vs. State*, 7 Md. 148; *Harwood vs. Marshall*, 9 Md. 107; *Parkinson vs. State*, 14 Md. 198; *Hollohan vs. State*,

evidence for the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.

ERROR to the City Court of Baltimore. The defendant in error, was tried on the following indictment, in Baltimore City Court, at June Term, 1830. "State of Maryland, City of Baltimore, to wit: The jurors of the State of Maryland, for the body of the City of Baltimore, do upon their oaths present, that John Dent, late of the city aforesaid, negro, otherwise called Jack Dent, on the 15th day of April, 1830, with force and arms, at the city aforesaid, in and upon one Joseph Daiger, then and there being one of the constables of the City of Baltimore, and in the execution of his the said Joseph's duty as such, and in the peace of God, and of the said State, then and there being, did make an assault, with the intent him the said Joseph Daiger, then and there feloniously, wilfully, and of his malice aforethought to murder, contrary to the form of the Act of Assembly in such case made and provided, and against, &c."

The second count was for a common assault and battery.

The defendant pleaded not guilty, and there was a general verdict of guilty, upon both counts of the indictment, when a motion was made in arrest of the judgment.

1st. Because, "the averment that Daiger was in the due execution of his office, is not made with time and place."

2d. "The means with which the assault was made, to carry into effect the intent, are not stated."

The City Court pronounced the following judgment:

"The first reason is not supported. On examination of the indictment it will be found, that the time and place in both counts, are correctly averred. The motion on this ground, is therefore overruled.

* The second reason, we think, is well founded. The Act of Assembly does not affect the form of the indictment, or the evidence necessary to support it, but leaves both as at common law, only changing the nature of the punishment. The offence is still a misdemeanor. The only question therefore, is, whether the means or instrument by which the intention was to be effected, ought to have been stated in the indictment. And we think they ought to have been. In ordinary cases of assault, the means, or instrument of inflicting the injury, are mere matters of aggravation, and therefore may be inserted or omitted, without detriment. But it is otherwise where the assault is accompanied by an intention to commit murder. In that case, the means or instrument used are material and necessary in the description of the offence, as they indicate the malicious intention of the party, and must therefore be stated as

32 Md. 401; *Deckard vs. State*, 38 Md. 209. The indictment in the case in the text was under Rev. Code, Art. 72, sec. 22, and was held to be sufficient because the offence was charged in the language of the statute. *Bode vs. State*, *supra*.

well in this case as where the crime has been consummated; and for this plain reason, amongst others, because in both the adequacy of the means, as well as their use, must be proved before the party can be convicted, and no evidence should be received of them, unless they are stated in the indictment. It will be found on recurrence to *Chitty*, *Starkie*, and *Archbold*, that all the precedents of indictments at common law, for offences of this kind, are in conformity to this opinion. The Court therefore arrest the judgment on the first count, but direct the clerk to enter it upon the second."

The present writ of error was thereupon prosecuted by the State.

The case was argued before BUCHANAN, C. J., EARLE, STEPHEN, and DORSEY, JJ.

Taney, (Attorney-General,) and *Gill*, for the State, contended, that an indictment for an assault with intent to murder, under the Act of 1809, ch. 138, is sufficiently certain, which charges the assault to have been made with that intent. That in such case neither the special manner of the *assault, nor the circumstances from which the particular intent may be inferred, need be stated. 10 Act of 1809, ch. 138, sec. 4; 3 *Chitty's Cri. Law*, 569, 591; *State vs. Cassel*, 2 H. & G. 410; 1 *East Cr. Law*, 411; 3 *Johns.* 511; 1 *Stark. on Plead.* 98, 102.

No counsel argued for the defendant in error.

STEPHEN, J. delivered the opinion of the Court. This case comes up on a writ of error to Baltimore City Court, and the sole question which it presents for the decision of this Court is, whether according to the principles of criminal pleading it is necessary in an indictment for an assault with intent to murder, to state in the indictment the instrument, or means made use of to effectuate the murderous intent. It is incontrovertibly true, that the main object of all pleadings, both civil and criminal, is to apprise the party charged, of the nature of the case to which he is called upon to respond, so that he may not be taken by surprise, and that he may come prepared to defend himself against the allegations of the opposite party. But we do not think that the principles of criminal jurisprudence require in this case anything more than that the offence should be charged in the language of the statute by which it is created. The indictment in this case is founded upon the Act of 1809, commonly called the penitentiary law—the offence as defined and prohibited by that law is an assault with intent to murder. This is the character given to the assault charged in this indictment. It is averred that it was committed with intent to murder, and such averment we consider to be a full compliance with the requisitions of the law. The means of effecting the criminal intent, or the circumstances evincive of the *quo animo*, with which the act was done, are considered to be more properly matters of evidence for the jury to demonstrate the intent,

than proper to be incorporated into the indictment; because that intent may be proved or illustrated by such a variety *of circumstances, as it would be very inconvenient, at all times, to embody in the indictment, or place upon the record; and if the means adopted are necessary to be stated, it would seem to follow as a necessary consequence that all the means, however multifarious, should be explicitly averred. Sir Matthew Hale observes 2 *P. C.* 193, "That in favor of life, great strictnesses have been in all times required in points of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof. More offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of God; and it were very fit, that by some law, this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time, grow mortal, without some timely remedy." It must be admitted that there is much good sense in the above remarks, which are entitled to great weight, when it is considered that they proceeded from one of the most enlightened, humane, and Christian Judges that ever graced or adorned the bench of British justice. That it is sufficient to charge the offence in the words of the prohibitory statute, will be found in 2*d Burr.* 1036, where the Court says, "It is enough for the prosecutor to bring the case within the general purview of the statute upon which the indictment is founded, if that statute has general prohibitory words in it; for where an indictment is brought upon a statute, which has general prohibitory words in it, it is sufficient to charge the offence generally, in the words of the statute."

In 3 *Johns. N. Y. Rep.* 511, the same principle is recognized and affirmed when the Court says, "The intent to commit *murder was here charged in the words of the statute, and we think that was sufficient."

This indictment is for an assault and battery, and the *quo animo* was to be collected from the circumstances. It was enough to state with the usual precision, the facts requisite to constitute an assault and battery, and to aver the intent with which it was made. This intent might have been inferred and proved from the declarations of the defendant, previous to the assault. The indictment required no other facts than were necessary to establish an assault and battery. The crime charged, was after all, but a misdemeanor. It was not a felony, though the intent was to commit one. The same principle has been affirmed and established by this Court, in the case of the *State vs. Cassel*, 2 *H. & G.* 407. Upon the whole, we think that the facts and circumstances evincive of the murderous intent, are

matters of evidence to be submitted to the jury, and are not necessary to be charged in the indictment.

The judgment of Baltimore City Court is therefore reversed.

Judgment reversed, and procedendo awarded.

JAMES McCORMICK, JR. vs. FAYETTE GIBSON *et al.*—December, 1830.

The bar, arising from the Act of Limitations, relied upon in the answer of one co-defendant to a bill in Chancery, brought by a creditor against devisees, to recover his claim out of the real estate of a deceased debtor, upon the ground that the personal estate had been exhausted in the payment of debts, will not enure to the benefit of the other co-defendants, and authorize the Chancellor to dismiss the bill. (a)

Upon a bill of this description, where the devisees have received distinct parcels of property, the interests of the defendants are several and distinct. The claim against each being in proportion to the amount devised to him. (b)

13 * APPEAL from Chancery. This was a bill filed in the Court of Chancery on the 19th of June, 1824, against the heirs, devisees and administrator, and purchasers from the heirs and devisees of Jacob Gibson, deceased, (the appellees,) by James McCormick, Jr. (the appellant.) The object of this bill was to enforce the payment of a promissory note of Jacob Gibson, dated the 18th October, 1817, payable five months after date, for \$2,500, which had regularly come to the hands of the complainant by endorsement. The bill alleged the personal estate of the maker of the note to have been exhausted in the payment of debts; that this note had not been paid; that a large real estate of the deceased was in the possession of the defendants by his devise, and by purchase from his devisees, and prayed for a sale of the real estate, payment of the note, and for general relief. Jacob Gibson died on the 10th of January, 1818. Several of the defendants answered the bill, others, non-residents, were proceeded against by publication, &c. Among the answers was the following of James Tilton, who had intermarried with one of the devisees of the deceased.

“The separate answer of James Tilton to the bill of complainant aforesaid :

“This defendant, now, &c. says that he has no particular knowledge of the note alleged to have been executed by the said Gibson,

(a) Affirmed in *Simms vs. Lloyd*, 58 Md. 480. Cited in *R. R. Co. vs. Trimble*, 51 Md. 110. Distinguished in *Thompson vs. Albert*, 15 Md. 283. As to sale of decedent's real estate for the payment of his debts, see Rev. Code, Art. 66, sec. 1; *Gibson vs. McCormick*, 10 G. & J. 65.

(b) Cited in *Crain vs. Barnes*, 1 Md. Ch. 155.

to Samuel Hughes, or of the endorsements thereon; but if the same was executed and endorsed as alleged, he is advised that the debt was due more than three years before the filing of the aforesaid bill, and he pleads the Act for the limitation of actions, in bar to the relief which is sought by the bill of complaint, and prays to have the benefit of the same at the final hearing. This defendant admits the death of the said Jacob Gibson, and that he made a will, as stated in the complainant's bill, and admits the will as filed. The defendant, however, does not admit that the personal estate has been exhausted in a due course of administration; on the contrary, he denies * that such is the fact, and he is advised that the heirs and devisees are not to be included or affected by any proceedings which may have been had at law against the executor of the said Jacob Gibson, and prays to be dismissed, &c." 14

None of the other answers relied upon the Act of Limitations. The execution of the note was proved, and the complainant had obtained judgment against the administrator. The final account of the administrator with the Orphans' Court, showed the personal estate to have been exhausted, and did not show that the debt claimed here, had been paid. Several of the answers admitted the complainant's demand had not been paid.

On the 22d January, 1828, upon final hearing, BLAND, C. passed the following decree:

"This bill was filed on the 19th January, 1824, by James McCormick, Jr. to have the real estate of the late John Gibson sold, to satisfy a debt due to him, on the ground that Gibson's personal estate had been exhausted. The claim of the plaintiff is founded upon a promissory note, bearing date on the 18th October, 1817, given by the late Jacob Gibson to Samuel Hughes, payable five months after, and of which, by several endorsements, the plaintiff has become the holder.

In opposition to this claim, one of the defendants, James Tilton, in his answer, insists and relies upon the Act of Limitations as a bar, and it is quite clear, that this objection, when made by any one of the defendants, is as effectual as if it had been made by them all. There is nothing in the proof to take the case out of the Act, and it has been established by the Court of Appeals, that a judgment against an executor, as such as that which has been obtained by this plaintiff against the executor of Gibson, cannot deprive the heirs of a deceased debtor of the right to take advantage of the Act of Limitation, as a bar." He therefore dismissed the bill with costs.

From this decree the complainant appealed to this Court.

* The cause was argued before BUCHANAN, C. J., MARTIN and DORSEY, JJ.

Taney, (Attorney-General,) and *Scott*, for the appellant, contended, that the Statute of Limitations offered no defence to the claim of the complainant. Because, 1. The claim demanded was not due at the death of Jacob Gibson. 2. Not being due at the death of Gibson, and his personal estate having been exhausted in the payment of debts, there is no foundation for the plea of limitations. 3. Jacob Gibson, by his will, charged his estate with the payment of his debts, and made a devise of the remainder of his estate after the payment of his debts. 4. That James Tilton being a non-resident defendant, and absent, could not avail himself of the plea of limitations. 5. That Tilton not appearing and answering the bill before the time limited for his answering it, in the order of publication awarded against him as an absent defendant, could not plead limitations. 6. That admitting the plea of limitations, the complainant was entitled to a decree against the other defendants, and particularly against those defendants who did not deny the claim, but consented to a decree; and against those not answering, a decree *pro confesso* had been obtained. They cited 1 *H. & J.* 743; 2 *Ib.* 48; 4 *Ib.* 126; 2 *H. & G.* 323; 8 *Com. Dig.* (*New Ed.*) 719; *Blackway vs. Stafford*, 1 *Dick.* 48; *Harr. Dig.* 348; 1 *Sch. and Lef.* 413, 428, 431; 2 *Sch. and Lef.* 630; 1 *Ball and Beatt.* 119; 3 *Bac. Abr.* 460, 461; 10 *Johns.* 529, 538, 547.

* No counsel appeared for the appellees.

16

DORSEY, J. delivered the opinion of the Court. The only question which we are called on to consider is, was the complainant rightfully turned out of the Court of Chancery, on the ground that the plea of limitations by James Tilton, one of the defendants, is as effectual a bar to any relief "as if it had been made by them all." To sustain this broad and general principle, thus assumed by the Chancellor, as the basis of his decree, but two cases have been cited; viz. *Clason vs. Morris*, 10 *John.* 524, and *Lingan vs. English*, decided by this Court at June Term, 1830. Before this tribunal, *Clason vs. Morris*, (as far as the present question is concerned,) if an authority at all, can only be regarded as one of the lightest character. It was decided in the Court of Errors of New York, but partially composed of lawyers, by ten senators concurring in opinion with one Judge of the Supreme Court, and five senators dissenting from that opinion; among the dissentient Judges, we find (Chancellor, then Chief Justice,) Kent, Thompson and Van Ness, and with them Senator Platt, subsequently a distinguished member of that Court. When we contemplate the overwhelming preponderance in the number of Judges of the Supreme Court, and perhaps of the legal talents of the Court of Errors, which dissented from the principle asserted in *Clason vs. Morris*, ought it not rather to be regarded as a case denying, than establishing the doctrine contended for. Justice Spencer, whose views were adopted by a majority of the senators, admits that

he had met with no cases in equity to sustain his position; and he rests it wholly upon an unwarrantable analogy, between proceedings at law and in equity. "For, (says he,) it is a well settled principle of law, that in actions upon contract, the plea of one defendant enures to the benefit of all, for the contract being entire, the plaintiff must succeed upon it against all or none: and therefore, if the plaintiff fails at the trial upon the plea of one defendant, he cannot * have judgment against those who let judgment go by default." But does such rigid formality exist in Courts of Chancery, or is it at all consistent with the principles and practice by which those tribunals are regulated? Must the complainants succeed against all or none? Every day's experience gives the negative to these inquiries. A decree may give joint relief to both complainants, or separate and distinct relief to each. As to one, the bill may be dismissed; whilst full relief is granted to the other. The same principle applies to defendants. Joint relief may be granted against both; a separate and distinct relief against each. The bill may be dismissed as against one defendant, and full relief obtained against the other. At law the same redress is given, the same judgment is entered against all. But this is the offspring of mere legal technicality, and bears no application to proceedings in a Court of Chancery; which disregarding matters of form, modifies its remedies to every variety of circumstances, and reaching the substance of the case, gives relief according to the several equities of the respective parties. **17**

If by analogy to the course of proceeding at common law, we are to adopt the doctrine, that a bar sustained by one defendant, operates to prevent a recovery against the rest, justice surely demands that the analogy should be carried out; and that in equity as at law, an acknowledgment by one defendant should restore the remedy against all. In that event, the answer of Fayette Gibson in this case, would entitle the complainant to a decree against Tilton, as well as the other parties defendants. If in the case in New York, where the defence went to the whole merits of the claim, it was a matter for discordant opinions amongst eminent jurists; is there room for a doubt on the subject before us, when the defence relied on is a mere statutory bar, intended only for the protection of those who seek shelter under its wings. Upon what grounds was the plea of limitations created at bar? Upon the presumption that the party had paid and lost, or was unable to produce * the evidence of his payment. Jacob Gibson died in less than three months after **18** the execution of the note on which the complainant's claim is founded; and that note is made payable five months after its date. Tilton's plea then cannot rest on the presumption that the whole note was paid by the testator, because he died before it became due; nor on the presumption that it was paid by Tilton, because he was under no legal obligation to do so. All that he could have been required to pay,

and therefore can be presumed to have paid, was that proportion of the debt which the value of the real estate given to his wife, bore to the value of the whole real estate devised. This is the greatest latitude that could be given to the operation of this plea of limitations. But it cannot be available even to that extent. He has pleaded for himself only; against his wife a decree *pro confesso* has been suffered to pass; so that nothing is saved by the plea but his life estate; the reversionary interest of the wife remaining liable to the claim of the complainant. Regarding the plea in this limited and almost immaterial aspect, can it be received as a bar to all redress against any of the defendants; some of whom have in answering, admitted every material allegation in the bill, and consented to a decree, giving the relief which has been prayed for? The interests of the defendants here are several and distinct, and not joint; the claim against each being in proportion to the amount devised to him. There is no joint contract to be enforced; no unity of interest in the property to be affected. If such a general rule of equity, as that stated by the Chancellor does exist (which we cannot admit,) it should not be applied to a case like the present.

The decree under consideration can derive no support from the case of *Lingan et al. vs. English et ux.* decided by this Court at June Term, 1830. The question here agitated was not presented by the facts in that cause. The complainants filed their bill, stating that

James M. Lingan,* their father, conveyed by deed to John
19 Henderson, a parcel of land; that Henderson executed and delivered a paper to Lingan, by which he acknowledged to have received of Lingan, "a deed for 420 acres of land lying in Montgomery County, which is to be accounted for by him; that the complainants were advised that said paper was an acknowledgment that no money was paid for said land; and that it was an engagement to pay the purchase, if there was in truth any sale to Henderson; or if not, to reconvey said land to him, Lingan." That John Henderson had since died intestate, leaving three of the defendants his heirs-at-law, and Lydia, (who had since intermarried with David English,) his widow, who administered on his estate, and "possessed herself of the personal assets of the estate sufficient to pay all just debts against it." The bill then prayed, "that by a decree of this honorable Court, the administratrix of said Henderson may be compelled to pay the amount of the purchase money for the land aforesaid; or if the sale should not be admitted or proved, that the heirs of the said Henderson may be compelled to reconvey to such of your complainants as are entitled thereto, the said land," and for general relief. English and wife filed their answer, neither denying nor admitting assets. The bill was taken *pro confesso* as to the other defendants, except Richard, who pleaded the Act of the General Assembly, entitled "an Act for Limitation of certain actions for avoiding suits at law." Upon these proceedings and the proof taken

in support of them, the Chancellor decreed a sale of the land for the payment of the purchase money. The bill presented no case warranting relief, but by a decree for the reconveyance of the land by the heirs of Henderson; or payment of the purchase money by the administratrix. To neither of which remedies did the complainants shew themselves entitled upon the proof. The Court of Appeals therefore, could not have done otherwise than as they did, reverse the decree and dismiss the bill. It * was not necessary to inquire into the applicability of the plea of limitations to the case presented by the bill, or into its effect and operation as pleaded. **20**

Decree reversed.

CHARLES WILSON vs. JOHN WILSON, Surviving Adm'r of JOHN WILSON.

The allowance for commissions made to a collector under letters *ad colligendum*, granted upon a deceased person's estate, ought to have no effect upon the commissions of the executor or administrator of the same estate. They are distinct and independent allowances for different services. (a)

The law having fixed a *minimum* and a *maximum* rate of commission to be allowed to executors or administrators, and vested a discretion in the Orphans' Court restricted only by those limits, an allowance by that Court, of commissions within those rates, is not to be reviewed here. This Court has no power to disturb such a decision. (b)

Interest is not to be charged on money retained by an administrator with the sanction of the Orphans' Court and consent of parties, to meet the future contingencies of the estate.

APPEAL from the Orphans' Court of Baltimore County. This was a petition filed by Charles Wilson, on the 2nd August, 1828, as one of the distributees of John Wilson, late of Baltimore County deceased, claiming his proportion of the estate. It charged that John Wilson died on the 1st of January, 1819; that Michael Tiernan and William Murdock obtained letters *ad colligendum* upon the estate of the deceased, and received a large sum of money on account thereof; that on the 11th of August, 1819, John Wilson and Benjamin Sterett were appointed administrators, and had little other trouble than to receive the estate from and pass receipts to the collector, and obtain discharges from the representatives; that a much larger commission had been allowed the administrators than the services rendered by them are really worth; that is to say, $7\frac{1}{2}$ per cent. on \$55,130, which with the allowance made to the collectors as * commission, exceeds 10 per cent. for that object; that the petitioner also was entitled to interest on \$4,000 for four years, which **21**

(a) Cf. *Lemmon vs. Hall*, 20 Md. 168.

(b) Approved in *Brady vs. Dilley*, 27 Md. 588; *Handy vs. Collins*, 60 Md. 231.

remained in the hands of John Wilson the defendant; that the defendant was about to settle another account and claim a further commission upon \$8,824.74, to which he is not entitled; because the whole of that sum was taken out in hardware by the petitioner, and that John Wilson had no trouble whatever, except in passing a receipt for the same. Prayer, that the defendant may discover what trouble he had in the settlement of the estate; that the commissions may be reduced, and Wilson charged with the amount disallowed in his next account; that he may settle another account, and for further relief, &c.

Copies of the accounts settled by the collector and administrators were filed with the petition, and which sustained the allegation of the amount of the commissions. The answer of John Wilson alleged, that by virtue of extraordinary diligence and perseverance on the part of the administrators, funds of large amount have been recovered from the collectors, and saved to the estate. That the collectors originally opposed the grant of letters, and shortly after their appointment collected \$38,600, and appropriated the same to their private and individual use by investing the same in hardware, and otherwise; that the collectors being applied to, refused or neglected to pay, and the administrators conceiving the estate in imminent peril of being lost, proceedings at law were instituted, and a decree obtained against the collectors; and finding it impossible to get the money, they were obliged to take such means as the collectors had it in their power to give; that a large portion of the estate was received in hardware, part of which, one of the administrators sold in the western country, making himself liable to the estate therefor, and for another part they procured purchasers; that as to the money retained by the administrators, it was done with the approbation of the Court and consent of all parties, to meet the contingencies

22 of unsettled claims and proceedings against * the debtors of the estate; that this defendant is willing to settle the estate so soon as the petitioner shall pay the sum of \$2,382.02, which he owes the estate, and has no objection that the Court may diminish the commissions, if in their judgment just and equitable.

The evidence in the cause sustained the allegations of the defendant.

The Orphans' Court decreed that the commissions allowed the administrators should not be reduced, nor the defendant charged with interest upon the sum retained by him; and that the defendant should settle a final account.

The petitioner appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Scott, for the appellant, and *Johnson*, for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. We do not think either of the points raised in this case can be sustained.

The 14th sec. of the Act of 1798, ch. 101, sub-ch. 3, authorizes the issuing letters *ad colligendum* by the Orphans' Courts of the several counties in the cases specified, and the 18th section authorizes an allowance to a collector for his whole trouble, of a commission on the amount of the property and debts actually collected and delivered to an executor or administrator, at the discretion of the Court, not exceeding three per cent. And the 2nd section of the 10th sub-ch. authorizes the allowance to an executor or administrator of a commission at the discretion of the Court, not under five nor more than ten per cent., on the amount of the inventory or inventories, excluding what is lost or has perished.

Here then were letters *ad colligendum* granted by the Baltimore County Orphans' Court, and a commission of three per cent. allowed to the collectors, and letters of administration afterwards granted, and a commission allowed * to the administrators of $7\frac{1}{2}$ per cent. on the amount received by them from the collectors and 23 accounted for, amounting the two commissions together to $10\frac{1}{2}$ per cent. which it is supposed exceeded the commissions that the Orphans' Court was authorized to allow, by one-half per cent.; on the ground that the whole amount of commissions to be allowed, cannot exceed 10 per cent.

But it is perfectly clear that the allowance to be made of a commission to a collector, and that to an executor or administrator, are distinct and independent allowances.

The allowance to a collector is for his trouble, &c. which has nothing to do with the trouble or duties of the executor or administrator; and the allowance to an executor or administrator is for his trouble and responsibility, for which no allowance made to a collector, can be any remuneration.

It is therefore no objection, that the commission allowed in this case to the collectors, and that allowed to the administrator, amount together, to more than 10 per cent. The restriction is, that a collector shall not be allowed more than three, nor an executor or administrator more than 10 per cent.

But it is contended, that the commission of $7\frac{1}{2}$ per cent. to the administrator, is a greater allowance than ought to have been made.

The law has fixed a minimum of five, and a maximum rate of commission of ten per cent. to be allowed to executors and administrators, with a discretion vested in the Orphans' Court restricted only by those limits, and the Court in allowing a commission of $7\frac{1}{2}$ per cent. having acted within the scope of that discretion, we do not think we have any power to disturb the decision, or to review what has been done in that respect. The various circumstances determining the amount of the commission proper to be allowed, cannot appear to this Court, and every case must be governed by its own peculiar

circumstances, subject only to the restrictions already mentioned. But if the allowance of commission within the prescribed limits was a

24 * fit subject of appeal, there is nothing in the testimony accompanying the record, showing the allowance made to the administrators to be too great.

The claim to interest on the amount retained by the administrators cannot be maintained; the money was retained with the consent of all the parties concerned, under the sanction of the Orphans' Court, to meet the contingency of a suit with the collectors, which appeared to be a matter not unlikely to happen before the accounts should be finally closed. The decree is affirmed with costs.

Decree affirmed.

THOMAS AYRES vs. EDWARD KAIN.—December, 1830.

A judgment of the County Court, upon an issue joined on a plea of *nul tiel record*, cannot be reviewed in the Appellate Court, when the appellant did not except to that judgment, and incorporate the record which was submitted to the Court in a bill of exception, nor put any matter upon the record to shew why such judgment should not be rendered. (a)

APPEAL from Harford County Court. This was an action of debt, brought upon an injunction bond by Edward Kain, (the appellee,) against Thomas Ayres, (the appellant.) The plaintiff, to a plea of general performance replied, shewing a final decree of the Court of Chancery dismissing the bill, to prosecute which the injunction bond declared upon, had been given. The defendant, Ayres, rejoined that there was no such decree; sur-rejoinder that there was such a decree and profert of the same. The County Court gave judgment for the plaintiff; upon which, after inquiry of damages executed, the defendant appealed.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

25 * *Speed*, for the appellant contended, that it was the duty of the appellee to produce the record, to sustain the judgment of the County Court.

Gill, for the appellee, contended, that the record referred to in the plea was used in the Court below merely as evidence, and that if the defendant supposed it did not sustain the replication, he should have excepted as in other cases, where the objection arises upon the evidence in the cause; and having failed to do that, the question was not now before the Court.

Judgment affirmed.

(a) Approved in *McKnew vs. Duvall*, 45 Md. 506. See *LeStrange vs. State*, 58 Md. 41, to the same effect.

OWENS vs. COLLINSON.—December, 1830.

The securities on an administration bond, in a suit brought by a distributee against the administrator, are not competent witnesses to prove, that the assets of the deceased have been consumed in the payment of debts.

It is not true as a uniform rule, that a creditor is a competent witness for administrators. He is only so, where the assets are sufficient for the payment of debts. When they are not, whether the administrator be plaintiff or defendant, if the verdict swells the fund to which he must look for the payment of his debts his incompetency is manifest; he is only competent when the verdict cannot affect his interest. (a)

The bail of the defendant is not a competent witness for him.

In an action upon an administration bond against a surety, the administrator is not a competent witness for the defendant. The witness is responsible for costs, in case of a recovery against the defendant.

An administrator, who, being called upon in Chancery to account, comes promptly into Court, answers the bill, and submits all his accounts and vouchers, and furnishes the means of detecting the errors which are fairly attributable to him, is not to be presumed guilty of a fraudulent concealment of credits actually omitted.

Accounts settled in the Orphans' Court, by executors, administrators and guardians, are *prima facie* evidence in all suits touching the matters therein contained, to which they are parties; and the *onus probandi* rests on him who seeks to impeach their correctness. (b)

The Orphans' Courts are the tribunals invested by law, with the power of passing claims against the estates of deceased persons.

(a) Cited in *Williams vs. Banks*, 11 Md. 229. But see R. C. 70, s. 1.

(b) Distinguished in *Bantz vs. Bantz*, 52 Md. 689, where the Court said, that the case in the text and that of *Donaldson vs. Raborg*, 28 Md. 34, "recognize the accounts as only *prima facie* right, but liable to be attacked with proof against them; and in cases of great lapse of time, and where the executor was dead, the Court held that strong proof would be required to overthrow the accounts. The Orphans' Court is the proper and primary tribunal, (although sometimes a Court of equity is invoked,) to determine all such controversies, and this Court has repeatedly said, that so long as an estate is open, (which means not finally closed and settled,) the accounts of the executor or administrator, in that Court, are subject to revision and correction as to any matter discovered to be in error. *Edelin vs. Edelin*, 11 Md. 415; *Stratton's Case*, 46 Md. 551." See *Spedden vs. State*, 3 H. & J. 206, note. In *Mitchell vs. Mitchell*, 3 Md. Ch. 74, the Chancellor said: "Though, as in the case of *Owens vs. Collinson*, an administrator may, when called upon to account to a Court of Chancery, exhibit with his answer, and explain, not only the accounts passed in the Orphans' Court, but the vouchers for the credits therein allowed him, I am of opinion that it would be of pernicious tendency to compel him to do so. It might cause the proceedings to run into a degree of prolixity which would be extremely inconvenient. The accounts settled with the Orphans' Courts are *prima facie* evidence in suits relating to matters contained in them, and he who disputes their correctness has the *onus* upon him. The vouchers, the Chancellor thinks, are to be regarded as evidence, and need not be filed as part of the pleadings. It

If an executor or administrator, *bona fide*, without any knowledge of its injustice, pay a claim previously passed by the Orphans' Court, though not proved in the manner prescribed by the testamentary system, such

26 * payment is not made at his risk. To a credit therefor, he is not only *prima facie* entitled, but his right to it cannot be controverted. So if he retain the amount of his own claim thus passed. (c)

When the accounts of an executor are under an examination in Chancery, if it should appear on the face of vouchers passed by the Orphans' Court that a claim paid, was not a just one against the deceased, it is as much the duty of a Court of equity to reject it, as if the illegality of its allowance were established by proof *de hors*.

I. as executor of E. claimed an allowance for the payment of a note signed I. and E. which was admitted by the Orphans' Court; I. passed his account accordingly, and was credited for the whole amount. This account being under investigation in Chancery, and it being admitted that the signature I. and E. was in E's hand-writing, in the absence of proof of partnership between them: *Held*, that the *prima facie* character of the account was not impeached.

Where two are bound for the payment of a specific sum, and one pays the whole, he can either at law or equity, call upon the other to contribute, and thus recover a moiety of what he has paid. (d)

APPEAL from the Court of Chancery. The appellant, Thomas Owens, a minor, by his *prochein ami*, filed his bill of complaint against the appellee, John Collinson, on the 9th of May, 1826. The bill stated that one Edward Collinson, of Anne Arundel County, died intestate, and without issue, some time in the year 1823, possessed of a considerable personal estate, leaving the complainant, (a sister's son,) and several brothers and sisters, his next of kin, and personal representatives. That John Collinson, the appellee, took out letters of administration on his estate: possessed himself as such, of the assets of the deceased, and disposed of the same to an amount more than sufficient to discharge all claims against him. That a large surplus remains in the hands of the administrator, subject to distri-

must be sufficient if they are produced before the auditor when he is about to state the account. But to require them to be produced now, and explained in detail in the answer, would give rise to a practice which, in my opinion, would render Chancery proceedings intolerably expensive and voluminous." Cf. *Scott vs. Dorsey*, 1 H. & J. 143.

(c) Approved in *Conner vs. Ogle*, 4 Md. Ch. 449; *Semmes vs. Young*, 10 Md. 247. Claims of executors and administrators stand on the same footing with those presented by other creditors of deceased persons, and the passing of such a claim by the Orphans' Court will cure a defect in the form of the affidavit to it. *Semmes vs. Young*, *supra*. The mere passing of a claim against an estate, or the approval of an account retaining for it, does not establish its correctness. The most that it accomplishes is, to protect the executor or administrator if he pay it without knowledge of its incorrectness. An executor or administrator is not bound to pay a claim because passed by the Orphans' Court. *Bantz vs. Bantz*, 52 Md. 690.

(d) Approved in *Yates vs. Donaldson*, 5 Md. 396. See *Norwood vs. Norwood*, 2 H. & J. 208, *note*; Act of 1880, c. 161.

bution among the representatives of the intestate. That instead of distributing the surplus, as bound by law to do, the administrator has converted the same to his own use, and refuses to pay complainant the share to which he is entitled; alleging that the assets of the intestate have all been paid away, or retained by the administrator for debts due him from the deceased; which debts so retained for, the complainant charges to * be false and fraudulent; and he further charges that the intestate died indebted 27 to a very inconsiderable amount, and that if pretended debts to a very large amount, have been paid by the administrator, it has been collusively done, and for the purpose, the more easily to convert the residue to his own use. Prayer, that said administrator may be compelled to account with complainant, and to pay him his distributive share, of whatever balance may be found to be due, and for general relief.

The *subpoena* which was issued on the above bill, was returnable to July Term, 1826.

At that term the defendant filed his answer, admitting that Edward Collinson died intestate in the year 1823, leaving the complainant, the son of a sister, and several brothers and sisters, and the children of brothers and sisters, his personal representatives, as alleged in the bill. That said intestate died seized, and possessed of both real and personal estate, and that defendant became his administrator. That the intestate being largely indebted to the defendant, and various other persons, he applied to, and obtained an order from the Orphans' Court, for the sale of his personal estate, which was accordingly disposed of, and the proceeds applied, by the defendant, to the payment of the debts of his intestate, as will appear by copies of his accounts settled with the said Court, marked exhibit (A) and the vouchers accompanying the same, numbered from 1 to 23, inclusive. That by said accounts it will appear, that the personal estate of the intestate was inadequate to the payment of his debts, and being so, the defendant alleges that application was made to the Court of Chancery for a sale of the real estate, to make up the deficiency; that a sale was accordingly decreed, and the proceeds thereof, after supplying the deficiency of the personal estate, were divided among the legal representatives of the intestate, all of whom, except the guardian of complainant, are perfectly satisfied with the manner in which the defendant has conducted his administration.

*The answer further states, that the intestate and defendant, for many years, were copartners, in all their various dealings and business, and that they continued so to be until a short time previous to the death of the intestate, when a dissolution, by mutual consent, took place, and an adjustment and settlement of their transactions and accounts was made in the presence of William Collinson and Edward Harper, two of the representatives of said intestate, upon which settlement, said intestate became indebted to 28

the defendant in the amount, for which he has been allowed in his settlements with the Orphans' Court. The answer denied all fraud, &c.

Exhibit (A) contains the accounts settled by the defendant, as administrator of John Collinson, with the Orphans' Court; the first proved and passed on the 8th February, 1825, the latter being the final account, on the 24th of June of the same year, by which the estate appears to be overpaid the sum of \$3,958.91½ cents.

Voucher No 13, is a note signed by John and Edward Collinson, payable to Nathaniel Chew, on demand, for \$228.50, dated May 22, 1812, which with interest to the date of its payment, by the administrator, on the 28th January, 1825, amounted to \$347.54. For the whole of this sum the administrator obtained a credit.

No. 16, is a note similarly signed, in favor of William Collinson, for \$550, dated July 14, 1814, and amounting the 7th January, 1825, when paid by the administrator, to \$896.77, for the whole of which a credit was likewise obtained.

No. 18, is an open account against John and Edward Collinson, due Nathaniel Chew, amounting when paid by the administrator, to \$470.38, for which also a credit was obtained.

No. 19, is an account against the deceased, due John Collinson the administrator, shewing a balance due the latter on the 25th March, 1823, of \$3,909.51, a credit for which was also obtained.

29 * No. 21, is a similar account, exhibiting a balance due to the administrator of \$580.35, for which likewise a credit was obtained.

The above claims were all proved, and passed by the Orphans' Court, prior to the settlement of the accounts of the administrator.

Commissions issued by consent, to Anne Arundel and Baltimore Counties.

With one of those commissions the complainant filed a copy of the administration bond of the defendant, by which it appeared that Edward C. Harper and William Collinson, were his securities for the faithful performance of his trust, and under the same commission, persons of the same name were examined as witnesses on the part of the defendant.

There was evidence that the administrator had received, after the death of the intestate, dividends on bank stock, standing in his name, to the amount of \$355.50, with which he had not charged himself in his settlements with the Orphans' Court; and it was further proved under the commissions, that the proceeds of a crop of tobacco sold by one Norris, on account of the intestate, were received by the administrator, with which in his said settlements, he had failed also to charge himself.

On the 8th of March, 1828, the auditor in obedience to the Chancellor's order for an account, stated an account between the defendant and complainant, by which, charging the defendant with the pro-

ceeds of the tobacco sold by Norris, the dividends on the bank stock, and the sums specified in the before mentioned vouchers, there appeared to be a considerable amount due the complainant, as his distributive share of the said intestate's estate.

Exceptions were filed by the defendant to this account, and the auditor in obedience to specific instructions given him by defendant, stated another account on the 31st May, 1828, according to which, crediting him with the disputed vouchers, and omitting to charge the proceeds of said * tobacco and bank dividends, he is made to have overpaid the estate the sum of \$4,077.80 cents. **30**

BLAND, C. on the 2d of June, 1828, rejected both of those accounts, and directed the auditor to state another, upon certain principles prescribed in the order.

On the 3d of June, 1828, the auditor, in conformity with this order, stated a third account, by which the State appeared to be overpaid \$3,132.32. On the same day, BLAND, Chancellor, rejected this account, as not being in accordance with his order, passed the day before; but being of opinion that the defendant had distributed all the assets which came to his hands, he dismissed the bill with costs.

From this decree the complainant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Alexander, for the appellant, cited *Ferguson vs. Cappeau*, 6 H. & J. 394; *Ib.* 402; 1 *Philips' Ev.* 52; *Craig vs. Cundell*, 1 *Campb.* 381; *Ringgold vs. Ringgold*, 1 H. & G. 81; *Hart vs. Ten Eyck*, 2 *Johns. Ch.* 67; The Act of 1798, ch. 101, sub-ch. 8 and 9; 1785, ch. 46; 1802, ch. 101, sec. 9; *Bean vs. Jenkins*, 1 H. & J. 135; *Morton vs. Beall*, 2 H. & G. 136; 2 *Madd. Ch. F.* 413, 442; *Morse vs. Royall*, 12 *Vesey, Jr.* 360; *Newland's Prac.* 297, 298; *Gilbert's Rep.* 150; 1 *Harr. Ch.* 455; 1 *Ambler*, 585; *Collins vs. Elliott*, 1 H. & J. 1; *Stevenson vs. Myers*, *Ib.* 102; 1 *Ball and Beatt.* 413.

Brewer, Jr. for the appellee, cited 1798, ch. 101, sub-ch. 9, sec. 13, 15. *Scott vs. Dorsey*, 1 H. & J. 231; *Spedden vs. The State*, 3 H. & J. 276; *Gist vs. Cockey*, 7 H. & J. 134; *King vs. Prosser*, 4 *Term Rep.* 17; *Scott vs. Dorsey*, 1 H. & J. 232; * 1 *Ambler*, 585; *Morse vs. Royall*, 12 *Vesey, Jr.* 360; *Gilb. Rep.* 150. **32**

DORSEY, J. delivered the opinion of the Court. The first question to which our attention is called in the consideration of this case is, are the securities in an administration bond, in a suit brought by a distributee against the administrator, competent witnesses to prove that the assets of the deceased have been consumed in the payment of his debts? Upon principle and analogy, this question is simple and easy; but when viewed in reference to decisions on the subject, it cannot be regarded as free from difficulty. In *Carter vs. Peace*, 1

T. R. 163, it was decided, that in an action against an administrator, one of his securities, for the due administration of the effects, is a competent witness to defeat the action. And this case is cited as establishing that principle in 2 *Stark. Ev.* 775. The grounds assigned by the Court in support of their opinion, were, that “the bare possibility of an action being brought, is no objection to competency;”—“that in order to disqualify a witness, it is necessary to show that he will derive a certain benefit from the result, one way or other;”—“that even the creditor of the administrators, which is a stronger case, would be a competent witness.” With great deference to authority so imposing, it does appear, that the grounds upon which the decision of the Court is placed, are not sufficient to sustain it. In the first place, it is not true as an uniform rule, or principle of law, that a creditor is a competent witness for administrators. He is only so where the assets are sufficient for the payment of debts. Where they are not, whether the administrators be plaintiffs or defendants, if the verdict swells the fund to which he must look for the payment of his debt, his incompetency is manifest. He is **33** *only competent, therefore, where the verdict cannot affect his interest. Can it be said then, that the admission of a creditor to testify for the administrator, (under the circumstances in which only his testimony is admissible,) is a stronger case, than that of a surety in the administration bond testifying for the administrators, defendants; when it is considered that a verdict for the defendants is a discharge *pro tanto*, of his liability on his bond; and that a verdict for the plaintiff is evidence against him the witness, in a suit on his administration bond. Can it be a bare possibility that an action will be brought, that the interest is too remote, when the liability is so immediate, the interest so obvious, the benefit so certain?

The case at bar, is not one, where the recovery against the administrator, is an indispensable preliminary to the institution of a suit against the securities; but one in which their responsibility (except in amount) is already fixed. Where they might have been sued before, or may be sued after the decree of the Chancellor, where the amount which ought to be recovered against the defendant, is identical, with that which should be recovered against them; where the decree too, may be used in evidence against them. But even admit it were the case, where a recovery against the principal is a prerequisite to the commencement of an action against the security, as in the case of a creditor suing an administrator; upon principle and analogy, the decision should be the same. The interest is direct; as by defeating the suit, he discharges himself from all claim for its amount. His liability is immediate; as upon failure to make the money of the administrator, his bond may be put in suit. That the bail is an incompetent witness for the defendant, is a principle so universally admitted, that authorities need not be cited to prove it. In 2 *Stark. Ev.* 786, it is laid down as text law, that “where a surety

would be immediately liable, in case of decision against the principal, his interest is obvious, and therefore a bail is incompetent in an action against his principal." In what respect * is the bail's responsibility more immediate than that of a security in an administration bond, where his principal is sued by a creditor? After judgment, and a return of a *non est* to *ca. sa.* and not before, can process be had against the bail. After judgment, a return of *nulla bona* upon a *fi. fa.* and not before, can you sue the security, in an administration bond. If the verdict be for the defendant, the bail is absolutely discharged from all liability for the debt sued for—if for the defendant administrator, his security is equally so. But the bail has this obvious advantage; his liability is not absolutely fixed and certain. At any time before, or within a few days after the return of the *scire facias* against him, he may surrender his principal, and thereby is absolutely discharged. Not so with the security in an administration bond; he has no such means of self-exoneration. But the present is a much stronger case, than even that of bail or surety in an administration bond, the administrator being sued by a creditor. Here if the plaintiff had any cause of action, the liability of the surety was fixed, and certain, and his only means of exonerating himself, was by defeating the claim of the plaintiff. Is it possible he can be deemed a competent witness for that purpose? Without violating all analogies, and the best established rules of evidence upon this subject, we think the testimony of the securities in the administration now before us, cannot be received. That the views of this Court have heretofore been in accordance with the present determination, we think inferable, from their opinions in the cases of *Seegar, Ex'rs vs. The State, use of Betton*, 6 H. & J. 162, and *Ferguson vs. Cappeau's Adm'r*, 6 H. & J. 394.

A liability for costs of suit renders a witness incompetent. In a suit by an indorsee against an accommodation indorser, the maker of the note is not a competent witness for the indorser; because in defeating the suit, he discharges himself from the costs, for which he would be answerable, in case judgment were rendered against the indorser. Or to speak more immediately on the facts before us, if a * suit were instituted on the administration bond against the surety, the administrator is an incompetent witness for the defendant, his testimony going to exonerate himself from the payment of costs, for which he would be liable to the defendant, in case a recovery were had against him. But if the administrator were sued as in this cause, on his administration bond, for the claim now in litigation, according to the principle now contended for, the security would be a competent witness for the defendant, although by his own testimony, he absolves himself from all liability for the debt, or cause of action. If such be the law, it has neither reason nor justice to sustain it. In *Miller vs. Falconer*, 1 Campb. 251, an action on the case for negligence in running against plaintiff's cart, with a dray.

The plaintiff's servant, who drove the cart, being called as a witness, was rejected by Lord Ellenborough, on the ground, "that the witness certainly comes to discharge himself." In *Morish vs. Foote*, 8 Taunt. 454, an action on the case for negligently driving a mail coach against the plaintiff's wagon-horse, whereby it died, the plaintiff's wagoner was rejected for incompetency, as being interested in the event of the suit, inasmuch as "he would placed in a state of security," by a verdict against the defendant. If in these cases, the witnesses were incompetent, (without a particle of proof showing aught for which an action would lie against them) on the ground that the verdicts to be rendered would "discharge them," or "place them in a state of security;" does not the same objection apply with still stronger force, to the competency of the witnesses, in the record before us. They are interested in the event of the suit, because the decree of the Chancellor, if in favor of the defendant, absolves them from all liability; if against the defendant, it is evidence against them when sued on their bond. *Iglehart vs. State, use of Maccubbin*, 2 G. & J. 235. In *Morton vs. Beall's Adm'r*, 2 H. & G. 136, it was determined that the security in a replevin bond, is not a competent witness for the plaintiff in the action of replevin. If the point

36 * there adjudged, be in principle distinguishable from that now under consideration, the shade of distinction is so faint, as to be discernible only by minds peculiarly adapted to the investigation of legal subtilities. Rejecting the testimony of the witnesses in the administration bond, the enquiry presents itself, are there any other grounds upon which the decree of the Chancellor, dismissing the appellant's bill of complaint, can be sustained? That the answer of the defendant with the accompanying exhibits, are sufficient for that purpose, we entertain no doubt. In May, 1826, the bill is filed, charging the fraudulent misapplication of the effects of the deceased, and conversion thereof to the defendant's own use, and praying that he may answer the allegations in the bill, and account with the complainant, &c. The defendant at the earliest moment that it could be done, appears in the Chancery Court, files his answer, denies the fraud with which he had been charged, makes a full disclosure of the manner in which he had settled the estate of the deceased, and files copies of the accounts which he had passed with the Orphans' Court, and exhibits all the vouchers for which he had obtained credit; although no requisition for that purpose had been made by the complainant. This promptitude and willingness in the defendant, to submit all his proceedings to the inspection of his adversary, and of the Chancellor, strongly repels the imputation of fraud, and entitles him to the favorable consideration of a Court of equity. Nor do we think, under the circumstances of this case, the proof that he has, in his settlements with the Orphans' Court, omitted to charge himself with \$355.50, received as dividends on bank stock, and \$471, the proceeds of a crop of tobacco from Thomas Norris, of Baltimore, and

his charging in this account No. 19, the whole, instead of the one-half of \$385, the difference in value between the lots of negroes divided, such conclusive evidence of wilful misconduct on the part of the defendant, as to divest him of all claim to the favor and protection of a Court of Chancery, and so to taint with perjury and * fraud, his accounts and vouchers from the Orphans' Court, as utterly to discredit them. The charge of \$385, manifestly 37 originated in mistake, as appears by the endorsement on the voucher, on which it is founded, and is an error into which he might very innocently have fallen. The failure to debit himself with the tobacco money received of Thomas Norris, appears also to have proceeded from carelessness or forgetfulness, as if fraud had been designed, he furnished the means of its detection, by charging in his account No. 21, against Edward Collinson's estate \$238.07, the one-half of \$477.34, the net proceeds of the tobacco, excluding the articles paid for by Norris, for Edward Collinson. Candor compels us to regard his omitting from his accounts, the \$355.50 of bank dividends, as an unintentional act. In accounting as he did for the bank stock, those interested in the estate, were naturally led to an enquiry as to payment of dividends. That a fraudulent concealment was intended, is therefore not to be presumed.

In argument for the appellant, it has been contended, that the proceedings in the Orphans' Courts, are not evidence of any thing for the appellee, and that he is bound to prove in this case, not only the actual payment of every claim for which he has received credit, but that such claims were justly due and owing from the intestate. After the solemn decisions made in this State, and reported in *Scott et ux. vs. Dorsey's Adm'rs*, 1 H. & J. 227; *Spedden vs. The State, use of Marshall and ux.* 3 H. & J. 251; *Gist's Adm'r d. b. n. vs. Cockey and Fendall*, 7 H. & J. 134, the doctrine insisted on, is no longer a subject for discussion in our Courts. If any principle has been conclusively settled by our decisions, it is, that the accounts settled in the Orphans' Courts by executors, administrators, and guardians, are *prima facie* evidence, in all suits touching the matters therein contained, to which said executors, administrators or guardians, are parties; and that the *onus probandi*, rests on him, who seeks to impeach their correctness. The great controversy * relative to such accounts, heretofore has been, not whether they were evidence at all, 38 but whether they were not conclusive evidence.

The appellant's counsel next urged that the "vouchers," on which the credits in the Orphans' Court were allowed, being produced, and it appearing upon the face of them, that though passed by the Orphans' Court, previous to their payment, they were not proved in the manner required by our testamentary system, as a pre-requisite to their passage; that the defendant paid them in his own wrong, and is entitled to no allowance therefor. The inconsistency and injustice of such a position is so glaring, that it is scarcely necessary to say it

is wholly untenable. The Orphans' Courts are the tribunals invested by law, with the power of passing claims against the estates of deceased persons, and the Act of Assembly of 1798, ch. 101, sub-ch. 8, sec. 22, declares, "that no executor or administrator, shall discharge any claim against the deceased, (otherwise than at his own risk,) unless the same shall be passed by the Orphans' Court, granting the administration, or unless the said claim be proved according to the following rules." The irresistible inference is, that if an executor or administrator, *bona fide*, without any knowledge of its injustice, pay a claim, thus passed or proved, that the payment is not made at his risk. To a credit for such a payment, under such circumstances, he is not only *prima facie* entitled, but his right to it, cannot be controverted. It has also been insisted, that admitting the settlements made with the Orphans' Court, are *prima facie* evidence, to sustain the credits for all payments made, in satisfaction of debts due third persons, yet they are no evidence to support an allowance made to the administrator for his own claim. This Court can see nothing to warrant such a discrimination. In the Act of 1798, ch. 101, sub-ch. 8, sec. 19, it is stated, "that in no case shall an executor or administrator, be allowed to retain for his own claim against the deceased, unless the same be passed by the Orphans' Court, and every such

39 * claim shall stand on equal footing with other claims of the same nature." As full power is delegated to the Orphans' Court, to allow an account of an executor or administrator, against the deceased, as if a like claim had been preferred by any other person. The claims of an administrator in this case, in common with all other claims against the deceased, being accredited to him in the settlement of his accounts with the Orphans' Courts, such accounts must be regarded by us, as the acts of a Court of competent jurisdiction, but whose proceedings being wholly *ex parte*, are not conclusive, but rest on the principle that, "*omnia rite acta fuisse presumuntur, donec probetur in contrarium.*" With the vouchers all before him, the appellant has not attempted to offer any testimony, (although several commissions were issued, giving him that opportunity,) to impeach or discredit any of them; but founds his objections, exclusively on suggestions arising on their inspection. This is a strong circumstance to repel the allegation of fraud, which has been urged against the appellee. He was guilty of no concealments with regard to the credits which have been allowed him, but furnished the Orphans' Court with the same grounds for suspecting and rejecting his vouchers, which he so promptly afforded the appellant. It cannot be denied, that if it appear on the face of a voucher, that it is not a just claim against the deceased; it is as much the duty of a Court of equity to reject it, as if the illegality of its allowance were established by proof *de hors*. Looking to vouchers Nos. 13 and 16, independently of any proof in the cause, or admission of the counsel on record, it must be admitted that the Orphans' Court erred, in allow-

ing the administrator's credits for their whole amount; because they show debts due by Edward and John Collinson, and not by Edward alone. But it cannot be denied, that if the whole of those claims were paid by John, after Edward's death, that the Orphans' Court would be justified in crediting John with a moiety of the amounts paid by him, upon the ground that Edward and John, being both principal debtors, * if one pay the whole, he can either at law or in equity, call upon the other to contribute, and thus recover a moiety of what he had paid; but connecting the admission made by the appellant's counsel, that the signatures to the notes, are in the hand-writing of Edward Collinson, the Court of Chancery were right in crediting the administrator with the whole payment made on those notes, it not appearing that Edward Collinson had any authority to sign the name of John; he is the debtor, being alone answerable for the payment of the notes. In thus considering the case, we put out of view all the testimony taken by the appellee to sustain his vouchers, upon the objections to its admissibility raised by the appellant, on the ground that the whole of it must be suppressed, as being given in answer to leading interrogatories, and that William Collinson and Edward C. Harper, being securities in the administration bond, are incompetent witnesses. But it is insisted on in behalf of the appellants, that these claims, and also No. 18, were debts due by Edward and John Collinson, under a general partnership, subsisting between them, and that John is not entitled to claim a moiety of any particular partnership debt, he may pay; but his claim, if any, must be for the balance due on a final settlement between the partners of the partnership concerns, or upon a full exhibition of all their company transactions, and thus ascertaining the general balance, to the payment whereof he is entitled. Upon what does the appellant rely for establishing the fact, that a general partnership existed between Edward and John Collinson. He has offered no evidence for that purpose, and he can insist on it only in two ways. First, that it is proved by the testimony taken by the defendant in support of his defence, or that the defendant had stated it in his answer, (though in a part not responsive to the bill.) If he relies upon the proof to which he has objected, he waives his objection to its competency; his whole equity is disproved, and he has nothing in the record to give him a moment's standing before this Court. If he relies upon the defendant's answer, * his predicament is equally deplorable. The whole equity of the bill is sworn away, and he has nothing to sustain it, which could produce any possible change in the decree of the Chancellor. Upon whatever grounds, therefore, the appellant may chose to rest his case, the vouchers Nos. 13 and 16 are sustained; but if he repudiates the answer and suppresses the appellee's testimony, taken under the commissions, he is entitled to claim a deduction of one-half from voucher No. 18, amounting to \$235.19, which being added to the one-half of

\$385, and the amount of bank dividends, and the price of the crop of tobacco of 1823, received by John Collinson, will make the sum of \$1,260.53, which amount is properly chargeable against the administrator, and being deducted from \$4,077.80, the amount of the estate overpaid, as per auditor's statement of the 31st May, 1828, will leave the estate overpaid by the sum of \$2,817.27. As to objection to vouchers Nos. 13 and 18, that the receipts thereon were signed by Nathaniel Chew of John, for Nathaniel Chew of Joseph, and that the appellee has adduced no proof to show an authority in the former to act for the latter, we have only to observe, that by allowing credit for these claims, the Orphans' Court have recognized the validity of those receipts, which recognition has been supported by the oath of the administrator, that he has paid the creditor; and that fortified too, by the possession and production of the note, and account, with the receipts thereon. Under such circumstances, and in the absence of all proof on the subject on the part of the appellant, we are not bound, and certainly feel no disposition to doubt the authority of the agent.

Decree affirmed.

42 * EBENEZER L. FINLEY *vs.* CHARLES L. BOEHME.—December, 1830.

F. intending to build on his farm at C. and have the bricks made there, agreed with B. under seal as follows: that is, "B. contracts to make for the said F. 800m bricks on said farm, in the following proportions: not less than one-fifth salmon; two-fifths red; two-fifths black. The first kiln to be ready for delivery in the month of May next. In consideration of which, F. contracts with B. to furnish free of expense, all the scantling and plank necessary for making the bricks; and pay B. \$5.50 for every thousand of good merchantable bricks in the following manner: one-half of said amount of bricks to be paid for in pine wood, delivered at the stump, when called for, on said farm, at \$2.50 per cord; \$800 to be paid when the first 100m are delivered; \$800 when the second 100m are delivered; and the balance when the contract is completed." *Held*, upon the construction of this contract, that the engagement for the delivery of the wood, was an independent covenant on the part of F. with which he was bound to comply, without waiting for the burning of the first kiln of bricks.

In an action upon a contract under seal, where the declaration assigns and relies upon specific breaches, on which the issues are made up, the Court will not consider whether the plaintiff has delivered the articles for which he claims compensation within the time limited by the contract, if that inquiry is not necessarily involved in the issues as joined, nor determine the effect of such an omission upon the rights of the parties.

The plea of general performance, when relied on as an answer to a specific breach assigned in a declaration in covenant, must either be regarded as a nullity or as putting in issue the acts of commission or omission imputed to the defendant as violations of his contract.

APPEAL from Baltimore County Court. This was an action of covenant brought by C. L. Boehme, the appellee, against E. L. Finley, the appellant. The plaintiff's declaration stated that "whereas by certain articles of agreement made the 17th February, 1820, at, &c. between the said plaintiff and defendant, (which said article, sealed, &c.) the plaintiff, for the consideration therein mentioned, did covenant with the defendant, to make and burn for him, the defendant, on a certain farm of the defendant, called Canton, lying and being in the county aforesaid, 300m bricks in a workmanlike manner, and of the following proportions:—not less than one-fifth to be of * salmon bricks, two-fifths of red bricks, and two-fifths of black brick—the first kiln of bricks to be ready for delivery **43** in the month of May next, ensuing, the day and year aforesaid—the number of bricks to be ascertained by the carter's tickets, to be given up on the delivery of each load. And the defendant, on his part, for and in consideration of the premises covenanted and agreed to and with the plaintiff, that he, the defendant, would furnish free of expense to the plaintiff, all the scantling and planks necessary for making the said bricks; and would pay the plaintiff, five dollars and a half for every thousand of merchantable bricks, made in the manner described in the said articles of agreement—one-half of said bricks to be paid for in pine wood, delivered at the stump when called for, on said farm, at two dollars and fifty cents per cord—three hundred dollars to be paid to the said plaintiff when the first hundred thousand bricks should be delivered—three hundred dollars when the second hundred thousand bricks should be delivered—and the balance to be paid when the said contract should be completed." 1st breach, And the plaintiff in fact saith, that afterwards, viz. on the 10th day of May, in the year aforesaid, at, &c. he did make and burn, in a workmanlike manner, on the farm of the defendant, called Canton, one kiln of bricks containing 100m bricks; and then and there had the same ready for delivery to the defendant, and did then and there offer to deliver the same to the defendant. 2nd breach, And the plaintiff in fact further saith, that on the day and year last aforesaid, at, &c. he the plaintiff did make 120m bricks, and was then and there ready and prepared to burn the same, but was, by the said defendant, hindered, prevented, and forbidden from burning the same, and from making and burning the residue of the the said 300m bricks. 3d breach, And the plaintiff in fact saith, that although he hath always, from the time of making the said articles of agreement, well and truly performed all things therein contained, on, &c. yet protesting that the said defendant hath not, &c. the said plaintiffs avers, * that although he did, on the tenth day of May, in the year aforesaid, make and burn in a **44** workmanlike manner, 100m bricks, on the farm of the defendant, called Canton; and then and there had the same ready for delivery, and offered to deliver the same to the said defendant; yet the said

defendant did not, and would not pay, and as yet hath not paid to the said plaintiff, the sum of three hundred dollars; and although the said defendant, on the day and year last aforesaid, at, &c. and on the farm aforesaid, did make 120m bricks, and was then and there ready and prepared to burn the same; yet the defendant hindered, prevented, and forbid the plaintiff to burn the same, or to make and burn the residue of the said 300m bricks; and although afterwards, viz: on, &c. at, &c. the plaintiff did demand of the defendant, and require him to deliver to the plaintiff, on the farm aforesaid, 350 cords of pine wood at the stump; yet the defendant wholly neglected and refused to deliver the same to the plaintiff, and still refuses. And so the said plaintiff saith, that the said defendant hath not, &c.

To this declaration the defendant pleaded, 1st, general performance.

2nd. That the said plaintiff never did deliver to the said defendant, any good merchantable bricks whatever, and of this, &c.

3d. And for further plea to the first count or breach in the declaration contained, the said defendant, by leave, &c. says that the plaintiff ought not, &c. by reason of any thing in the said first breach of the declaration contained; because he says, that, protesting, &c.; yet the said defendant in fact saith, that the said defendant did not hinder, prevent, or forbid the said plaintiff from burning the 120m bricks, or from making and burning the residue of the 300m bricks in the declaration mentioned; and of this he puts himself upon the country.

4th. And for further plea to the second breach or count in the declaration, the said defendant, by leave, &c.—the said defendant, protesting as in the last plea, says that the * plaintiff, for any thing in the said second count or breach contained, ought not, &c. because he saith that he, the said defendant, did pay to the said plaintiff the sum of three hundred dollars, in the said second count or breach mentioned, and all other sums of money which, by the said agreement he ought to pay him; and of this he puts himself upon the country, &c.

Upon these pleas issues were joined.

At the trial of the cause the following exceptions were taken: 1st. The plaintiff gave in evidence the following contract, to wit: "Agreement between Charles L. Boehme and E. L. Finley. E. L. Finley, intending to build a dwelling-house and other houses, on his farm at Canton, and to have all the bricks for such houses made on the farm; and Charles L. Boehme being desirous of contracting for the making of said bricks, the said Charles L. Boehme and E. L. Finley, have mutually contracted with each other, and by these presents do hereby contract with each other, in the following manner—that is to say: Charles L. Boehme, contracts to make for the said Ebenezer L. Finley, 300m bricks, on said farm; the bricks to

be made and burnt in a workmanlike manner, and in the following proportions:—not less than one-fifth to be of salmon bricks, two-fifths of red bricks, and two-fifths to be of black bricks. The first kiln of bricks to be ready for delivery in the month of May next—the number of bricks to be ascertained by the carter's tickets, which are to be given on the delivery of each load—in consideration of which E. L. Finley contracts with the said Charles L. Boehme, to furnish, free of expense, to said Boehme, all the scantling and plank necessary for making the said bricks, and to pay the said Charles L. Boehme five dollars and a half for every thousand of good merchantable bricks, made in the manner heretofore described; in the following manner:—one-half of said amount of bricks to be paid for in pine wood, delivered at the stump when called for, on said farm, at two dollars and fifty cents per cord—three hundred dollars to * be paid to the said Charles L. Boehme, when the first 100m 46 bricks are delivered—three hundred dollars to be paid when the second 100m bricks are delivered—and the balance to be paid when the contract is completed. As witness our respective hands and seals, this seventeenth day of February, 1820."

And then proved by Charles Brown, a competent witness, that he examined the bricks manufactured by the plaintiff, for the defendant, at Canton farm: that there was a clamp of bricks burnt—he recommended Boehme to take off nine inches from the clamp, which Boehme did—79,300 remained; there was six cords of wood remaining, and casing sufficient for all the raw bricks—then 120,000 bricks in the shed, as nearly as they could ascertain—the 79,300 bricks were burnt as well as the clay would admit, the clay was weak, the bricks were merchantable—the unmerchantable bricks taken down, were seven or eight thousand. That Finley refused to deliver the wood to burn the other bricks with, unless paid for in cash—that the bricks under the shed were well prepared for burning, and were not burnt for want of wood. The conversation with Finley was on the 3d day of November. That the bricks would have worked up well on the ground, but would not bear transportation—merchantable bricks were from \$5.50 to 6—would have made no difference in price by selling 300,000. Finley told Boehme that he had not complied with his contract—that he, Finley, was in advance, and would furnish no more wood unless paid for in cash—half a cord of wood requisite to burn 1,000 bricks. And also proved by James Shields, that the witness is a brickmaker—selected the clay himself—commenced where he found the best clay, convenient to water—dug clay for 300,000 bricks—was detained three or four weeks for want of plank—the clay was all dug and the floors ready—applied to the carpenter for plank—never saw Finley at the brick yard, although he staid there constantly, the carpenter furnished the plank—he applied to Finley at his office—in two or three days the plank came— 47
* he moulded about 200,000 bricks—Mr. Boehme would not

have more moulded—after they stopped, Boehme and witness called on Finley—Finley refused to deliver wood unless for cash—clay was selected with care—there is none better there—and more bricks have been since made out of it—the bricks were well burned, well moulded, and well tempered—115,000 to 120,000 in the clamp—shed would hold 160,000 to 170,000—never saw Finley at the yard—when he applied to Finley for plank, Finley said he thought he had it, and in two or three days the plank came—they were afterwards delayed six or seven days from burning for want of plank—he never applied to Finley for plank, for the clamp—Boehme was there once or twice a week—there was wood enough cut upon the place, in the same field, to have burnt another clamp. The plaintiff also offered evidence to the jury, that he delivered 4,100 bricks to defendant, which were received by defendant. The defendant to support the issue on his part, gave evidence of the following payments, to wit:

Cash payments made C. L. Boehme:

1820, May 9, Cash paid him.....	\$100 00
“ May 11, Cash paid him.....	200 00
“ June 17, Cash paid him.....	250 00

And of the delivery of 43½ cords of wood, at \$2.50 per cord. The defendant then moved the Court to direct the jury, that if they believed that the defendant Finley, was in advance in money to the plaintiff upon the contract, he was not bound to deliver the wood demanded, until paid for—which direction the Court [ARCHER, C. J., HANSON and KELL, J.] refused to give; but instructed the jury, that the defendant under the contract was bound to deliver any wood demanded, which might be necessary for the burning of the bricks, in the progress of the contract—the defendant excepting.

2d Exception. The plaintiff and defendant, having given the evidence as stated in the defendant's first exception, the defendant 48 prayed the Court to direct the jury. 1st. That * the plaintiff is not entitled in this case, to recover any other damages than the excess between the price of so much firewood delivered at Canton farm, as would have been necessary to burn so much of the 300,000 bricks, as were not burnt by plaintiff; and the price at which said wood was by the contract in this case, to have been furnished by defendant. 2d. That the plaintiff is not entitled to recover, unless the jury shall find from the evidence, that the first clamp of bricks was ready for delivery by the time stipulated in the contract, provided they find that the delay was not caused by the defendant; or that if entitled to recover at all, nothing on account of the bricks burnt in said first clamp, which directions and each of them, the Court refused to give. Defendant again excepting, and the verdict and judgment being for the plaintiff, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Johnson, for the appellant, abandoned the first exception, and contended for a reversal of the judgment upon the second exception. He cited, 1 *Saund. Rep.* 320, [m. 4;] 10 *Johns. Rep.* 213; 7 *Pick.* 181; 8 *Ib.* 178; 6 *H. & J.* 38; *Saund. P. and C.* 121.

Scott, for the appellee, cited 1 *Wheat. Sel.* 383; 2 *Hen. Black.* 389; 10 *Johns. Rep.* 203.

DORSEY, J. delivered the opinion of the Court. After adverting to the state of the pleadings, he said that at the trial of this cause, two bills of exceptions were taken by * the defendant, the first of which he has abandoned in this Court, as also the first 49 prayer in his second bill of exceptions.

The first branch of the second prayer in the second bill of exceptions is, "that the plaintiff is not entitled to recover, unless the jury shall find from the evidence, that the first clamp of bricks was ready for delivery by the time stipulated in the contract, provided they find that the delay was not caused by the defendant." This instruction is predicated upon the concession, that the testimony offered was sufficient to warrant the jury, but for this objection as to time, in finding for the plaintiff on all the issues. To test the correctness of the Court below, in refusing this direction, the only inquiry to be made is, does the agreement between the parties make this stipulation, as to the time, within which, the first hundred thousand bricks were to be ready for delivery, a condition precedent, the performance of which by the plaintiff, must precede his right to require the defendant to comply with any of the covenants, the infraction of which is made the basis of this action? That such is not the construction given to this contract by the appellant's counsel is obvious, or he would not have made the prayer he did, in the first bill of exceptions; nor the first part of the prayer in the second bill of exceptions; both of which are founded on the admission, that the defendant's engagement to deliver the wood is an independent covenant, not at all depending on the time of the burning of the first kiln of bricks. That it was the design of the contracting parties that a portion of the 350 cords of wood should be used in burning the bricks, will not be denied. If so, a part of it must of necessity be delivered before the burning of any bricks. But there is nothing in the contract itself, nor in the intention of the parties to be collected from it, to show that the wood was to be delivered in parcels, as the burning of the bricks progressed. If so, the agreement would have been shaped accordingly, and not have provided, as it has done, that it should be delivered at the stump "when called * for." Its 50 terms negative such an interpretation. The wood was to be given as a payment of half the price of the whole quantity of bricks to be burnt, and not merely to be used in burning them: as for that purpose, 150, instead of 350 cords, would have been sufficient. We regard therefore, this engagement for the delivery of wood, as an in-

dependent covenant on the part of Finley, and with which, he was bound to comply, without waiting for the burning of the first kiln of bricks within the time limited by the articles of agreement. This disposes of the first branch of the second prayer, in the second exception. But the second part of that prayer presents a different question. It concedes the plaintiff has a right to recover, but it invokes an instruction of the Court to the jury, that nothing is recoverable on account of the bricks burnt in the first clamp. If this point could arise under the pleadings in this cause, it would distinctly present the question, whether the stipulation as to time, is to be regarded as of the essence of the contract, and in the nature of a condition precedent; or as a mutual or independent covenant. Believing as we do, that we are not imperiously required to decide this question as to time, under the issues in the case before us, we mean to express no opinion upon that subject; and we are the more inclined to do so, from the consideration that this point has not been fully argued, and that it will come before us in a much more important suit, now upon our docket. Under the issues joined on the 2d, 3d and 4th pleas, it is manifest as regards time, that no question could arise, as those pleas by legal implication admit the truth of all the facts stated in the declaration (of which the time, &c. is one,) except those, which they specifically deny.

It is under the issue joined then, on the plea of general performance, that the appellant must avail himself, if at all, of the violation of the stipulation as to time. And in considering his right to do so, it may not be amiss to premise, that the plaintiff can recover damages for no other breaches than those charged in the declaration, as the specification thereof * is an implied admission, that the
51 defendant, in all other respects, has complied with his contract. It follows, as a corollary, that the plea of general performance in this case, applies only to those covenants which are alleged to have been broken. If it were otherwise, and according to its literal import, the plea of general performance put in issue every covenant on the part of defendant to be performed, it might produce this strange absurdity, that the plaintiff would recover damages for breaches of covenants, whereof he had never complained; but on the contrary, the performance of which by legal intendment, he had admitted by his declaration. To any imaginable declaration which could be framed on the articles of agreement, that form the groundwork of the present action, the plea of general performance is inapplicable and vicious. If it be pleaded, even to a debt on a bond conditioned for the performance of covenants, and issue be taken thereon, a verdict on such issue forms no basis on which a judgment can be entered, but a repleader must be awarded. To a declaration like that before us, assigning specific breaches, it must either be regarded as a nullity, or as putting in issue, the acts of omission or commission imputed to the defendant as violations of his compact. In

either aspect, the Court below were right in refusing the instruction. The plaintiff avers in conformity to the agreement, that in the month of May, "he did make and burn in a workmanlike manner, on the said farm of the said defendant, called Canton, one kiln of bricks, containing 100m bricks, and then and there had the same ready for delivery to the defendant, and did then and there offer to deliver the same." Instead of traversing this fact as he ought to have done, if he intended to rely upon its falsehood as a bar to a recovery, either in whole or in part, the defendant pleads "that the said plaintiff never did deliver to the said defendant, any good merchantable brick whatever;" thus, by legal intendment distinctly admitting the allegation, that the first kiln of bricks was burnt and ready for delivery at the time stipulated. This fact therefore, * the plaintiff need not prove, and the defendant is precluded from controverting it on the trial. The County Court then, could not do otherwise than refuse the direction to the jury which they were called upon to give. Concurring with them in their opinions in both bills of exceptions, we affirm their judgment. 52

Judgment affirmed.

THOMAS SIBLEY vs. DOROTHY WILLIAMS, Ex'r of WALTER WILLIAMS.—December, 1830.

An action may be maintained by a creditor of a testator, against the executor of his executor, suggesting a *devastavit* by the first executor of the goods of his testator. (a)

The Statute, 30 Chas. 2, ch. 7, and a part of 4 and 5 Will. and Mary, ch. 24, are in force in this State. They concern the administration of justice, and it has always been understood, that the Judges under the old Government, laid it down as a general rule, that all the statutes for the administration of justice, whether made before or after the Provincial charter, so far as they were applicable, should be adopted. (a)

Under the Act of 1798, ch. 101, sub-ch. 14, sec. 2, it is clear that the Legislature did not mean to make any thing, the subject of administration in

(a) Cited in *Coates vs. Mackie*, 43 Md. 129. The question there was whether an action at law would lie for a legacy against the administrator of an executor, where the latter has wasted the assets of his testator. It was contended that the action could be maintained by virtue of the statutes referred to in the case in the text. But it was held that these statutes provided remedies for creditors, by which they might be able to recover their debts, and did not extend to legatees, and that the remedy of legatees in such cases was by a proceeding in equity. The Court said that Mr. Alexander "in his *British Statutes* states in a note on page 586, that the remedies provided by the above mentioned statutes extend to legatees and next of kin as well as to creditors. The case of *Sibley vs. Williams*, to which he refers, does not so decide; nor have we, after a very careful examination of the books, been able to find any case in which it has been ever so held; and as the statutes themselves apply in terms to creditors alone, we conclude that Mr.

the hands of the administrator, *d. b. n.* which did not exist in specie. The Act of 1820, ch. 174, sec. 3, extended such an administration, to bonds, notes, accounts and evidences of debt, which a deceased executor or administrator may have taken, received, or had in that character, and to money in his hands, and gives power to the administrator *d. b. n.* to recover the same by an action on the bond. (*b*)

APPEAL from Montgomery County Court. This was an action of debt, instituted on the 3d July, 1827, by the appellant, against the appellee. The declaration was as follows:

Dorothy Williams, late of, &c. executor of the last will and testament of Walter Williams, late of the said county, deceased, which said Walter Williams was in his life-time, the executor of the last

53 will and testament of Leonard Williams, *late of said county, deceased, was summoned to answer unto Thomas Sibley, in a plea that she render unto him the sum of fifty-three dollars and a half, current money, which from him she unjustly detained, &c. and whereupon the said Thomas, &c. says, that whereas the said Leonard Williams in his life-time, to wit, on the 16th October, 1818, at the county aforesaid, by his certain writing obligatory, commonly called a single bill, (now here to the Court shewn, the date of which is the day and year aforesaid,) twelve months after the date thereof, promised to pay, or cause to be paid unto Ann Williams, who hath since intermarried with the said Thomas Sibley, by which said marriage, the right to sue for and recover the said debt, hath devolved upon the said Thomas, the sum of fifty-three dollars and a half, current money, with interest from the date thereof. Nevertheless, the said Leonard Williams in his life-time, and the said Walter Williams in his life-time, after the death of the said Leonard Williams, and the said Dorothy Williams, since the death of the said Walter Williams, although often thereunto requested by the said Ann Williams, whilst she was sole, and by the said Thomas, since his intermarriage aforesaid, the said sum of money, or any part thereof, have not, nor hath either of them been rendered or paid to the said Ann, whilst she was sole, or to the said Thomas since his intermarriage aforesaid, but the same, &c. wherefore the said Thomas says, he is injured, &c. and the said Thomas further saith, that the said Walter Williams, as executor of the said Leonard Williams as aforesaid, received in his life-time, and took possession of the assets, goods, chattels, rights and credits which were of the said Leonard Williams at the time of his death, of great value, to wit, of the value of \$5,000, and wasted, destroyed, and converted the same to his own use in his life-time, to wit, &c.

Alexander has fallen into error in supposing that the provisions of these statutes extend to legatees."

(*b*) Cited in *Donaldson vs. Raborg*, 26 Md. 326, and *U. S. vs. Walker*, 109 U. S. 262. See Rev. Code, Art. 50, secs. 107-109; *Hagthorp vs. Hook*, 1 G. & J. 131; *Hagthorp vs. Neale*, 7 G. & J. 13; *Gardner vs. Simmes*, 1 Gill, 425; *Lemmon vs. Hall*, 20 Md. 168; *Stewart vs. Ins. Co.* 53 Md. 572.

To this declaration, the defendant demurred generally, and the plaintiff having joined in demurrer, the County Court, [KILGOUR and WILKINSON, A. J.] gave judgment for the defendant. The plaintiff appealed to this Court.

The cause was submitted on notes to BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Z. *Magruder*, for the appellant, referred to *Toller Ex.* 44; 3 *Bac. Ab.* 19, 99, *tit. Ex. and Adm'r*; Stat. 30 Car. II, c. 7; 405 W. & M. c. 24; Acts of 1798, c. 101; 1820, c. 174, sec. 3, 6; *State vs. Blackiston*, 2 H. & G. 139; *Ord vs. Fenwick*, 3 *East*, 104; *Dorsey vs. Smithson*, 6 H. & J. 61.

F. S. *Key*, for the appellee.

* ARCHER, J. delivered the opinion of the Court. This is an action of debt, against the executor of an executor, on a single bill, suggesting a *devastavit*, by the first executor of the goods of his testator, and the question submitted by the demurrer is, whether the action is maintainable. At common law, no executor was answerable for a *devastavit* by his principal. 1 *Saund.* 219, no. C. 2; *Bac. Abrid.* 445, and the reason assigned in the latter authority, was because such executor could not be supposed to know how his testator had disposed of the goods, and therefore this was esteemed *actio personalis, quæ moritur cum persona*. But it being found inconvenient, that when an executor made an alteration of the goods of the testator and died, that creditors to the first testator should be disappointed in the collection of their debts, a statute was passed in the 30th year Chas. 2d, ch. 7, giving to creditors a right to recover their debts of the executors and administrators of executors in their own wrong. In 4 and 5 William and Mary, ch. 24, it is recited that it had been doubted whether 30 Chas. 2, ch. 7, extended to any executor or any administrator of * an executor or administrator of right, who for want of privity in law was not before answerable, and is
61
62
“enacted and declared that all and every the executor and executors, administrator and administrators of such executor or administrator of right, who shall waste or convert to his own use, goods, chattels or estate, of his testator or intestate, shall from thenceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been.” Williams in his notes on *Saunders*, 1 vol. 219, i. e. in pointing out the distinction between an action against the executor himself upon a judgment suggesting a *devastavit* by him, and one against the executor of such executor, suggesting a *devastavit* by the former executor, says, the former action can only be brought upon a judgment previously obtained against the executor, *de bonis testatoris*, or where he is made a party to a judgment against a testator by *scire facias*; but in the other, an action may be brought in every case where the executor in his life-time, was in any

way guilty of any act which amounts in law to a *devastavit*, and this position is clearly sanctioned, by the very words of the statute of William and Mary, which makes such executor "chargeable in the same manner as his testator should or might have been."

There can be little doubt but that these statutes were in force in this State. They concerned the administration of justice, and it has always been understood that the Judges under the old government laid it down as a general rule, that all statutes for the administration of justice, whether made before or after the charter, so far as they were applicable, should be adopted. *Kilty's Rep. on Stat. Intro. 6.*

The statute 30 Chas. 2, ch. 7, is reported by Kilty to have been found applicable, and to have been used and practised under, but the same author has considered that the 4 and 5 William and Mary, ch. 24, was not in force. As it regards many of the provisions of this statute, the remark is undoubtedly true; but so far as regards that part of this statute which relates to the subject under consideration,

63 * we apprehend the compiler was in error, for had it not been for this law, the statute 30 Chas. 2, ch. 7, would have expired by its own limitation, and it is in the nature of a declaratory law, expounding the statute of 30 Chas. 2. If it be true that 30 Chas. 2, ch. 7, was in force up to the period of the Revolution, it could only have been so in virtue of the statute, 4 and 5 William and Mary, ch. 24, which made the same perpetual. But it is supposed that these statutes are superseded, and rendered entirely unnecessary by our testamentary laws. But a careful examination of them brought us to a different conclusion. Unless the plaintiff can obtain his remedy in the manner he has sought it, insuperable difficulties will be opposed to his recovery by any other course. We speak now on the supposition, that there has been an actual, and not a mere technical *devastavit* of the goods. If the action thus conceived cannot be supported, the present creditor could only look to the administrator *de bonis non*, on the estate of the first testator, and we think there could be no recovery against him, unless such administrator had other goods than those wasted. The Act of 1798, ch. 101, sub-ch. 14, sec. 2, makes it the duty of administrators *de bonis non*, to administer all things in that Act described as assets, not converted into money, and not distributed or delivered, or retained under the Court's direction. In the passage of this law, it is clear that the Legislature did not mean to make anything the subject of administration in the hands of the administrator *de bonis non*, which did not exist in specie. If property had been converted into money, such money was not the subject of administration, but the estate of the first executor or administrator was liable therefor, as for a *devastavit*, although such executor or administrator had failed to deliver over assets in his hands, yet the Legislature never contemplated, if such assets had not at the time of the granting of the letters *de bonis non* any existence. but were wasted and destroyed, that they should be

the subject of administration. They could not in the nature of things be assets; * damages for such waste might have been made assets, and power might have been given to such administration to recover such damages; but such is not the fact. The Acts of Assembly are silent upon the subject. The Act of Assembly of 1820, ch. 174, sec. 3, extends only to bonds, notes, accounts and evidences of debts, which the deceased executor or administrator may have taken, received or had as executor or administrator, and to money in his hands, and gives power to the administrator *de bonis non*, to recover the same by an action on the bond. Had this Act given a similar remedy in cases of all personal property which had ever come to the hands of the first executor, there would have been no ground to sustain this action, for the remedy in such a state of the law would have to be sought through the administrator *de bonis non*, and through him only; but where property, which has not been converted into money, and for which no evidence of debt has been taken, but has been wasted and destroyed, to creditors situated like the present plaintiff, there is no remedy, but by a resort to the estate of the delinquent executor or administrator. If indeed that be deficient, or such estate is apparently insolvent, such creditor may ultimately have recourse to the testamentary or administration bond. The judgment is reversed and judgment rendered for the plaintiff on the demurrer. *Judgment reversed.*

RICHMOND AND RICHMOND vs. DE YOUNG.—December, 1830.

It has long been the established practice of our Courts, upon the production, of a release of the principal under the insolvent laws of another State, by the special bail, to enter an *exoneretur* of the bail.

APPEAL from Baltimore County Court. This was a *scire facias* against Meichel De Young as special bail of C. E. Chevalier. The writ issued on the 2d * August, 1828. At September Term, 1828, of Baltimore County Court, the defendant had become the bail of Chevalier, against whom the present plaintiffs obtained judgment at September Term, 1827. The declaration in the original action, counted upon a promissory note of Chevalier, bearing date at Philadelphia, the 17th November, 1825, for \$449.87, payable six months after date to the plaintiffs. And also contained the common counts.

By the 29th rule of Baltimore County Court, the principal may be surrendered in discharge of his bail, upon payment of costs at any time during the sitting of the Court, to which the *scire facias* against the bail is returnable, and before the jury is discharged; but this privilege shall not extend to an adjourned Court, when the first *scire*

facias is returned *scire feci*, or *nihil* is returned upon a second *scire facias*.

The *scire facias* was returned at September Term, 1828, "made known," whereupon the defendant, before the jury for that term was discharged, appeared and moved the Court, to exonerate him as the bail of Chevalier, because he, Chevalier, had been discharged under the insolvent laws of Pennsylvania.

It was admitted that the plaintiffs at the time when the contract upon which the judgment was obtained, were, and ever since have been, citizens or residents of the State of Rhode Island, and that Chevalier was a citizen or resident of Pennsylvania. On the 15th October, 1827, Chevalier obtained his discharge from the Court of Common Pleas of Philadelphia, which ordered "that the said petitioner, Chevalier, shall not at any time hereafter be liable to imprisonment, by reason of any judgment or decree obtained for payment of money only, or for any debt, damage, cost, sum or sums of money, contracted, occurred, occasioned, owing, or becoming due before the time of such assigment." The law under which this discharge was granted, existed prior to the making of the original contract, and it was also agreed, that the facts and circumstances

66 * of the case might be considered as if pleaded to the *scire facias*; that no objection should be taken to the motion upon the ground of form. The County Court [ARCHER, J.] adjudged that the defendant, De Young, should be exonerated and discharged from his bail aforesaid. Upon which the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Hinkley, for the appellant. *R. N. Martin*, for the appellee.

BUCHANAN, C. J., delivered the opinion of the Court. We think the special bail in this case was properly exonerated by Baltimore County Court.

As far as we have been able to trace the subject, it appears to us, to have been long the practice of the Courts of this State, to discharge a special bail, on the production of evidence of the release of his principal, under the insolvent laws of another State. It was done by the late General Court, and is done, as far as we can ascertain, by the County Courts in the several judicial districts, in cases similar to this; and seeing nothing opposed to it, in the Constitution of the United States, we are not disposed at this late day, to shake a practice so well, and as we think properly established. The judgment of the County Court, is therefore affirmed, with costs.

Judgment affirmed.

GEORGE BLIZZARD, Adm'r of GEORGE P. MERRYMAN *vs.* JACOBS,
Adm'r of JOHN JACOBS.—December, 1830.

The object of the Act of 1825, ch. 167, throughout, is to prevent an accumulation of costs. (a)

M. and J. gave their joint and several single bill, upon which an action was brought against the administrator of J. The defendant moved the Court for * a non-suit under the Act of 1825, ch. 167, suggesting, that M. was alive, and within the county at the institution of the suit. **67**

The County Court decided that a motion was a proper mode of bringing the question before the Court, and awarded a non-suit. *Held*, upon appeal, that the Act of Assembly had no application to the case.

Where two obligors united in a bond, and one of them is dead, the 1st section of the Act of 1825, ch. 67, does not prohibit separate actions against the survivor, and the representative of the deceased; nor does it apply where only one suit has been brought, although all the obligors are alive, and reside in the same county. (b)

Where the obligors are all alive and reside in the same county, and the obligee elects to sue one of them only, he cannot bring another suit afterwards against the others, without being subject to a non-suit.

The office of the 2d section of the Act of 1825, ch. 167, is to provide for the case of the death of one or more joint and several obligors, where the judgments being different, the surviving obligor or obligors cannot be united in the same action with the representative of the deceased obligor or obligors. There the creditor at his election may have one or two suits, one against the survivor, and another against the representative. Yet if there be more than one survivor living in the same county, he is as to them, restrained to one suit.

Where obligors live in different counties, the creditor may sue on both, or either, at his election. He is however restricted, as to original parties to his bond, to one suit in each county.

APPEAL from Baltimore County Court. This was an action of debt, brought on the 15th September, 1826, by the appellant, against the appellee, on the following single bill :

"Twelve months after date, we or either of us, do promise to pay or cause to be paid unto George P. Merryman, his heirs or assigns, the just sum of \$400, it being for value received of him. Witness our hands and seals, the 25th June, 1808.

MARTICO MERRYMAN, [seal.]

JOHN JACOBS, [seal.]"

The writ was returnable to September Term, 1826, at which term, the defendant appeared and laid a rule on the plaintiff to declare.

(a) See Rev. Code, Art. 64, sec. 52.

(b) Cited in *Cruzen vs. McKaig*, 57 Md. 461. The Act of 1825, c. 67, sec. 1, incorporated in Rev. Code, Art. 64, s. 52, does not apply to actions on covenants. *Ibid*. The non-joinder of defendants must generally be taken advantage of by plea in abatement. *Brown vs. Warram*, 3 H. & J. 444, note (b).

During that term, the plaintiff filed his declaration, and the single bill aforesaid; and at March Term, 1827, laid a rule on the defendant to plead. The cause was continued to September, 1827, at which term the * defendant moved the Court to *non pros.* the action, **68** upon the ground that the obligation on which the suit was founded, was executed by the defendant's intestate, in his life-time, together with a certain Martico Merryman. That Merryman survived the intestate, is still living, and now resides in Baltimore County, and that no suit or other proceeding was ever instituted against Merryman, upon the obligation aforesaid. This motion was accompanied by the defendant's affidavit to the facts. At the succeeding term, (March, 1828,) the County Court [HANSON and KELL, A. J.] decided:

1. That the truth of the facts upon which the motion was grounded, might be inquired into by the Court, without the intervention of a jury.

2. That the evidence then offered, established the facts of the motion.

3. That under the Act of 1825, ch. 167, the action must be *non prosed.*

The plaintiff excepted to this judgment of the Court, upon the following grounds:

1. Because the plaintiff ought to have pleaded the matters stated in the motion and evidence, and thus given the defendant the opportunity of trying the truth of the facts before a jury, or of replying thereto, and avoiding the effect of those facts by replication.

2. Because the motion was made too late, and should have been made at the appearance term, and before the rule to plead was laid.

3. That it was a motion in abatement upon merely technical grounds.

4. Because this action was not in opposition to the provisions of the Act of 1825, which gives no authority to dismiss the action when only one suit has been brought.

The judgment of the County Court being for the defendant, the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EABLE, MARTIN, and STEPHEN, JJ.

Gwynn, for the appellant, contended, that the judgment of the County Court should be reversed for the reasons urged before the County Court. 1 *Chitty's Plead.* 215; *United States vs. Fisher*, 2 *Cranch*, 386, 390; *The Mayor, &c. vs. Moore*, 6 *H. & J.* 381; *Few vs. Marsteller*, 2 *Cranch*, 24; *Hall vs. Jacobs*, 4 *H. & J.* 245.

J. Scott, and *R. N. Martin*, for the appellee, cited *Schooner Paulina vs. United States*, 7 *Cranch*, 52; 1 *Tidd Pr.* 139; 1 *Sellon Pr.* 101; 6 *H. & J.* 273; 1 *Tidd*, 149; 3 *East*, 155; *King vs. Horne*, 4 *Durn. and East*, 349; 1 *Kent Com.* 419 to 431; *The People vs. Utica Insurance*

Company, 15 *Johns*. 358; *Sickles vs. Sharp*, 13 *Johns*. 497; 4 *H. & McH.* 165; *Union Bank vs. Ridgely*, 1 *H. & G.* 324.

BUCHANAN, C. J., delivered the opinion of the Court. This case depends upon the construction of the Act of 1825, ch. 167.

The suit was brought on a joint and several single bill against the administrators of one of the obligors, the other obligor being alive at the time; and on motion, a judgment of *non pros.* was rendered, an affidavit being filed in Court of the fact, that the other obligor was living, and that no process had been sued out or served upon him.

* The title of the Act of 1825, ch. 167, is, "an Act to prevent the unnecessary accumulation of costs in civil suits;" and that is the object of the Act throughout. The first section provides, that it shall not be lawful to institute more than one suit on a joint and several bond, penal or single bill, when the persons executing the same are alive, and reside in the same county, and that if more than one suit be instituted on any such bond, penal or single bill, judgment of *non pros.* shall be entered against the plaintiff or plaintiffs, in such suits. 71

In this case, both of the persons, executing the single bill on which the action was brought, were not alive at the time of instituting the suit, and if there had been at the same time, another action against the surviving obligor, it would not have been within the prohibition to institute more than one suit on a joint and several bond, penal or single bill, when the persons executing the same are alive. That prohibition being confined to the case of all the obligors being alive, without providing for the case of one or more being dead, and leaving to the obligor, besides his suit against the survivor or survivors, the liberty to sue also the representatives of the deceased obligor or obligors; nor is it within the provision, that if more than one suit be brought on any such bond, &c. judgment of *non pros.* shall be entered, there being but one suit. It is clearly then wholly unaffected by the first section; the words such bond, &c. in the first section, have reference to the case before mentioned, of all the obligors being alive. And though in such cases, not more than one suit is permitted to be brought, yet no obligation is imposed upon the obligee to sue all the obligors, (which by such a multiplication of parties, might produce an unnecessary accumulation of costs, contrary to the intention of the Legislature,) but he may sue one only, if he pleases. If, however, he does so, it is at his own risk, and having made his election, he cannot afterwards bring another suit without being subject to be non suited. Provision being thus made by the 1st sec. for preventing an * unnecessary accumulation of costs, where all the obligors are alive; the office of the 2d sec. is to provide for the case of the death of one or more joint and several obligors, where the judgments being different, the surviving obligor or obligors cannot be united in the same suit, with the representatives 72

of the deceased obligor or obligors. The language used is, "that if either of the said obligors shall be dead, then in that case, it shall be the duty of such clerk to docket one action against the surviving obligor or obligors, and if requested so to do by the plaintiff or plaintiffs, or by his, her, or their attorney, it shall be the duty of such clerk to docket also an action against the executors or administrators of such deceased obligor, and to issue a summons, &c. and the same proceedings shall be had, and the same judgment entered thereon, as if separate actions had been brought against each and every obligor, in such joint and several bond, &c." The expressions used, are not very technical, and are somewhat obscure. But looking to the general object of the law, the saving of costs to the parties, it could not have been the intention of the Legislature, to take from a creditor his right of election, which might be exercised with a saving of costs, by bringing only one suit either against the surviving obligor or the representatives of the deceased obligor, as might be deemed most expedient; and to compel him to bring suit; whether he would or not, against a surviving obligor, (as contended for by the counsel for the defendant,) who might be insolvent; with the privilege of suing also at his election, the representatives of the deceased, which might produce a very unnecessary accumulation of costs, contrary to the intention of the Legislature, and operate injuriously to the creditor where the surviving obligor is insolvent, and sometimes vexatiously to the surviving obligor, as where he is only a security. We must search then for the intention of the Legislature, which however obscurely expressed, or untechnical the language used, where it can be discovered, ought to be regarded. And keep-

73

ing that rule in view in the construction of this * Act, we think the meaning of it is, not that the clerk must at all events, if one of the obligors be dead, docket a suit against a surviving obligor without directions, and whether the obligee or his counsel wish or not; but that as the surviving obligor and the representatives of the deceased obligor cannot be united in the same suit, and the obligee is entitled to his remedy against both, if he chooses to pursue it, two suits may be brought, one against the representatives of the deceased obligor, and the other against the survivor. And where it is said that it shall be the duty of the clerk to docket one action against the surviving obligor or obligors, the meaning is, that whether there be one or more obligors surviving, there shall be but one action against them, and that the creditor shall not be permitted to bring separate actions against the several surviving obligors, which is not provided against by the first section, where separate suits are only prohibited in the case of all the obligors being alive and living in the same county. And this view is strengthened by the circumstance, that in the 7th section, making provision for the case of obligors residing in different counties, which is not provided for in the 1st section. Similar expressions are used as to clerks docketing actions. The lan-

guage of that section is "that in case the obligors, &c. shall reside in different counties, then and in that case, it may be lawful for the clerk of the County Court to docket one action, &c. against the obligor or obligors in such bond, &c. who reside in the same county, and for the clerk of another County Court, to docket another action, &c. against the obligor or obligors who may reside in that county, &c." The case of obligors residing in different counties, or of some being dead, not being provided for by the first section, and the bringing of more than one suit in such a case not being prohibited, the creditor could as before the passing of the Act, have brought suits in different counties, or where some were dead, against the survivors, and also against the representatives of the deceased obligors, without the aid of the 2nd section; and as it could not have been the * intention of the Legislature to drive an obligee to an unnecessary accumulation of costs, by compelling him to bring a use-
 less suit against an insolvent obligor, and thus obliging him to sue also the representatives of the deceased obligor, or by compelling him to sue a surviving obligor who was only a security in the bond, &c. whether he wishes to do so or not; but rather to prevent a useless accumulation of costs, by restraining him from bringing more suits than the nature of the case may absolutely require. The 2nd section must be understood as providing only against more suits than one, being brought against the surviving obligors, where there may be more than one; and the 7th section as providing against more suits than one, being brought in any county in which the obligors may reside. When they reside in different counties, no matter how many may reside in either county, the obligee is not required to bring suit in every county in which the obligors may reside, but may, if he chooses, bring one suit only, against such of the obligors as may reside in the same county, although there should be others residing in a different county. The provisions of the 7th section cannot be misunderstood, and the object of both is an unnecessary multiplication of suits, and the consequent accumulation of costs in the two cases not provided for by the 1st section. The one where some of the obligors are dead, and the other where they reside in different counties. We therefore think that the judgment of non suit ought not to have been rendered.

Judgment reversed, and procedendo awarded.

* STATE, use of the JUSTICES OF THE LEVY COURT OF BALTIMORE COUNTY vs. JOHN H. DORSEY *et al.*—December, 1830.

The Levy Court of Baltimore County, having omitted to make the levy for the year 1823, between the 1st of March and 31st of December of that year, as they were bound to do by the Act of 1817, ch. 22, were author-

ized by the Act of 1823, ch. 23, to "make and close the levy for the year 1823, on or before the 1st of March, 1824." *Held*, that as the collectors of the levy were not to be appointed before the assessment was made, the Act of 1823 carried with it an extension of the time for appointing those officers; or if it did not, their appointment under the Act of 1817 was not restricted, as the laying of the levy was, to the 31st December of the year for which the tax was levied. (a)

The Levy Court being a corporation, had power to accept and approve the bond of a collector appointed to collect the levy, authorized by the Act of 1823, though not executed and filed with them until the 2d of March, 1824.

When a suit is brought on a private bond, &c. for the use of an individual, such person is not the legal plaintiff. The use is only entered for the protection of his equitable interest. If the *c. q. u.* dies pending the suit, his death is not the subject of a plea; nor is there for the purposes of the suit, any necessity for suggesting his death. The suit goes on as if he was still living or the use had never been entered. There is no reason why in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference. (b)

(a) Cf. *Ellicott vs. Levy Court*, 1 H. & J. 220; *State vs. Merryman*, 7 H. & J. 64.

(b) Approved in *Fridge vs. State*, *post*, m. p. 116; *Wallis vs. Dilley*, 7 Md. 250; *Logan vs. State*, 39 Md. 188; *Dashiell vs. Baltimore*, 45 Md. 620; *LeStrange vs. State*, 58 Md. 46. Cited in *State vs. Norwood*, 12 Md. 194. Cf. *Green vs. Johnson*, *post*, m. p. 389. In *Logan vs. State*, it was contended that the death of the equitable plaintiff prior to the issuing of the final writ in a suit on an official bond made that writ invalid. The Court said that the true character of such actions was well stated in the case in the text, and, after quoting from the opinion in that case, added that although there the defendants had been summoned and the question was whether the suit had abated, this circumstance did not render the reasoning of the Court inapplicable. "The decision that there is no necessity for the purposes of the suit to enter the use, and, if entered, that it matters not to the defendant how it may vary or change as to the person asserting the same right, and the reasons on which it is based, apply to the case before us. We regard it as a plain determination that the entry of the use or the endorsement of the name of *cestui que use* on the writ, is not essential to its validity, and does not affect the commencement or continuance of the action." In *Dashiell vs. Baltimore*, the Court said: "In considering the naked question whether or not the action lies, we can look only to the right of the legal plaintiff to maintain it. If the right of action is in him, it is wholly immaterial for whose use it may be brought, or who may be equitably entitled to the fruits of the judgment; for with that the party sued has no concern. If the equitable plaintiff dies pending the suit, it does not abate, and his death is not the subject of a plea in abatement *puis darrein continuance*, nor is there any necessity for suggesting his death and bringing in his representatives. The suit goes on as if he were still living, or the use had never been entered. The judgment is entered in the name of the legal plaintiff and it is nothing to the defendant who may be entitled to the equitable interest." When the *cestui que use* in an action in the name of the State is a *feme covert*, it is not necessary that the name of her husband should be used as next friend. *Le Strange vs. State*, *supra*. See Rev. Code, Art. 57, sec. 26; Art. 63, sec. 8; Art. 64, sec. 44, amended by Act of 1880, c. 161.

So where a Levy Court was abolished pending a suit brought in the name of the State, for the use of such Levy Court, against the obligors in a collector's bond, it was held, that a plea in abatement *puis darrein continuance*, that the Levy Court had been extinguished, was no objection to the further prosecution of the action.

In an action of debt on a bond with a collateral condition, where the defendant has pleaded general performance, and the plaintiff replied assigning a breach of the condition, it is a departure for the defendant to allege in his rejoinder, matter which shows the bond never had any legal existence.

It is a sufficient breach of the condition of a collector's bond, taken in pursuance of the Acts of 1794, ch. 53, and 1817, ch. 142, that the collector did not finish and complete the collections of the assessment or rate imposed, &c. placed in his hands and accepted by him for collection, within one year and six months after the delivery to him of the copy of the account of assessment, and list of taxables required to be delivered to each collector.

The design of the Act of 1815, ch. 173, allowing to collectors, one year after the expiration of the time for which they are appointed, to collect balances due them, was only to give them further time for their own benefit, to * collect what they had neglected to collect in due time, in the same manner in which they might have made the collections, **76**
within the time prescribed.

CROSS-APPEALS from Baltimore County Court. This was an action of debt brought in the name of the State of Maryland, for the use of the Justices of the Levy Court of Baltimore County, on the 14th of March, 1826, against the appellees, John H. Dorsey, Nicholas Dorsey, Frederick Grapevine, and Leonard Pouder, on a bond to the State of Maryland, dated and approved on the 2d of March, 1824, in the penalty of \$15,499, with the following condition: "Whereas the said John H. Dorsey hath been appointed by the Justices of the Levy Court for Baltimore County, one of the collectors of the county tax for the City of Baltimore, for the year 1823, within the 9th, 10th, 11th and 12th wards of the said city; the condition of the above obligation is such, that if the above bound John H. Dorsey, shall faithfully discharge his duties as such collector for the 9th, 10th, 11th and 12th wards within the said city, then the above obligation to be void, else be and remain in full force, &c."

The defendants pleaded, 1st, general performance.

2d. That the said State, its, &c. because they say, that the Justices of the Levy Court of Baltimore County did not, at any time during the year 1823, appoint the said John H. Dorsey, collector of the tax mentioned in the condition of the said writing obligatory; and the said defendants further say, that on the 19th day of February, in the year 1824, the following order was passed by the Justices of the Levy Court of Baltimore County: "We, the subscribers, Justices of the Levy Court for Baltimore County, have this day assessed and taxed the assessable property of the City and County of Baltimore for the year 1823, and apportioned the same agreeably to the

aforegoing levy list; and for the collection of the same, have appointed the following persons, viz. for the late first election district of the said county, now called collection district number one, we have

77 * appointed, &c.; and for the City of Baltimore, we have appointed the following persons, viz: For the first, &c. and for the ninth, tenth, eleventh and twelfth wards of the said city, we have appointed John H. Dorsey. And the said several collectors, on entering into bond, according to the Act of Assembly, are hereby authorized and empowered to collect and receive from the owners of property assessed in the aforesaid districts and wards, the following rate or assessment, that is to say, on all the property assessed in the aforementioned several districts in the said county, the rate or sum of one dollar and ten cents on every hundred dollars, so as aforesaid assessed; and on all property assessed in the aforementioned wards in the said city, the sum or rate of sixty-three cents on every hundred dollars, so as aforesaid assessed; and the said several collectors are hereby authorized and required, if need be, to execute therefor, and pay the same over as the Justices of the Levy Court of Baltimore County shall, from time to time direct. Given under our hands and seals, this 19th day of February, in the year of our Lord 1824." And that, after the passage of the said order, and on the second day of March next following, the said writing obligatory was executed and delivered to the said justices, and by them then approved and accepted, to wit, at the county aforesaid; and this the said defendants are ready to verify. Wherefore they pray judgment.

3d. "And the said defendants, further defend, &c. and say, that the said State, its, &c. because they say, that since the commencement of this present term of Baltimore County Court, and prior to filing this plea, the Justices of the Levy Court of Baltimore County, for whose use the said action of debt was instituted, as a Court, have ceased to exist, and that no successors have been appointed to the said Court hitherto; and this they are ready to verify, wherefore they pray judgment, if the State, &c."

78 4th. "And the said defendants, further defend, &c. and say, that the said State, its, &c. because they say, that after * the commencement of this present term of Baltimore County Court, and prior to the time of filing this plea, a body politic and corporate, by the name and style of the commissioners of Baltimore County, was duly created and established; the several individuals comprising the same, between the days and times aforesaid, having been duly elected such commissioners; and having also taken and subscribed, before a competent authority, the oath required by law, of each of such commissioners; and the said defendants do further say, that after such election and qualification of the several commissioners of Baltimore County, and prior to the time of filing this plea, the Mayor and City Council of Baltimore did duly and legally provide and enact, that the collectors of the aforesaid county tax, of which the said

John H. Dorsey was one, should pay to the register of the City of Baltimore, all such sums of money as they, the said collectors, had received from the taxes imposed by the authority of the Levy Court of Baltimore County; and so the said defendants say, that the right of action of the said Justices of the Levy Court of Baltimore County, on the bond declared on in this suit, if any, since the institution of this suit, has been extinguished, and this, &c."

To the second, third and fourth pleas, the plaintiff demurred generally, and the defendants joined in demurrer.

To the 1st plea the State replied as follows; viz: that the plaintiff ought not to be barred, &c. because the said plaintiff says, that after the making of the said writing obligatory, and before the commencement of this suit, to wit, on the third day of March, in the year 1824, at the county aforesaid, the Justices of the Levy Court of Baltimore County aforesaid, directed and caused the clerk of Baltimore County Court, to deliver to, and place in the hands of the said John H. Dorsey, as one of the collectors of the county tax for the City of Baltimore, for the year 1823, within the ninth, tenth, eleventh and twelfth wards of the said city, in the said condition of the said writing obligatory * mentioned a fair copy of the fair and accurate account kept by the said clerk of the assessment or rate imposed and levied by the said Levy Court, as by law directed and authorized, on the assessable property within the said wards of the City of Baltimore, as a county tax for the year 1823, and an alphabetical list of the names of the persons who then were owners of the said assessed property, in each of the said wards, and liable as well as the said property for the payment of the said assessment or rate, so imposed and levied thereon, with the amount of each of the said person's assessment or proportion of the said county tax annexed, to be collected, paid and accounted for, by the said John H. Dorsey, as such collector aforesaid, within the time, and in the manner prescribed by law; and the said John H. Dorsey, as such collector aforesaid, mentioned in the said condition of the said writing obligatory, then and there received and accepted the said copy of the account of assessment and lists of the persons and amounts assessed for collection, and to be paid and accounted for as aforesaid. And the said plaintiff avers, that the whole amount of the county tax for the year 1823, so levied and imposed on the assessable property within the said wards of the City of Baltimore, as specified in the said copy of the account of assessment and lists, so delivered to, and accepted by the said John H. Dorsey, as such collector aforesaid, including the commission of six per cent. allowed to him for the collection thereof, was and is, a large sum of money, to wit, the sum of \$7,972.17, to wit, at the county aforesaid. And the said plaintiff further says, that the said John H. Dorsey, as such collector aforesaid, on and by the said delivery to, and receipt by him, of the said copy of the account of assessment and lists aforesaid, so placed in

his hands, and accepted by him for collection as aforesaid, was duly and lawfully authorized, and it became and was his duty, as by law prescribed and required, within twenty days thereafter, to wit, at the county aforesaid, to proceed to collect the said assessment or rate, to the amount of the said sum last * above mentioned, as specified in the said copy of the account of assessment and lists so placed in his hands, and by him accepted for collection, and to finish and complete the collections of the same in the several wards aforesaid, within one year and six months after the delivery to and receipt by him, of the said copy of the said assessment and lists; yet the said John H. Dorsey, regardless of his duty as such collector aforesaid, did not finish and complete the collections of the assessment or rate so imposed and levied as a county tax for the year 1823, on the assessable property within the said wards of the City of Baltimore, and placed in his hands and accepted by him for collection, as such collector aforesaid, within one year and six months after the delivery to and receipt by him, of the said copy of the account of assessment and lists aforesaid; but wholly neglected and refused, although often requested, to finish and complete the collections of the assessments so placed in his hands, and still doth neglect and refuse so to do; and therefore the said plaintiff says that the said John H. Dorsey hath not faithfully discharged his duties as one of the collectors of the county tax for the City of Baltimore, for the year 1823, within the said wards of the said city, but therein hath wholly failed and made default, contrary, &c. and this, &c.

And for assigning a further breach of the condition of the said writing obligatory, the plaintiff says, that after the making of the said writing obligatory, and after the delivery to, and receipt by John H. Dorsey, as such collector aforesaid, of the copy of the amount of assessment, and list of names and amount of county tax to be by him collected, for the year 1823, for the ninth, tenth, eleventh and twelfth wards within the City of Baltimore, to wit, at the county aforesaid, it became and was by law the duty of the said John H. Dorsey, as such collector, to pay and account for the amount of the sums so by him to be collected, as specified in the said lists, in such manner and at such time as the said Levy Court of Baltimore County should direct and appoint. * And the said plaintiff

81 further says, that the said Levy Court, afterwards, to wit, on the 7th of September, 1825, at, &c. did direct and appoint that the said John H. Dorsey, should pay and account for the collections of the assessments so placed in his hands as aforesaid, to the justices of the Levy Court of Baltimore County aforesaid, on or before the first Tuesday in March next thereafter, to wit, &c. whereof the said John H. Dorsey had notice. And the said plaintiff avers that the amount of the collections of the assessments of the said county tax for the year 1823, for the said wards which it was the duty of the said John H. Dorsey, as collector to have paid to the Justices of the

Levy Court of Baltimore County, on or before the said, &c. was the sum of \$7,493.84; yet the said John H. Dorsey, regardless of his duty as such collector, did not, on or before the said, &c. pay or account for the collections of the said assessments so placed in his hands, and by him accepted, or any part thereof, to the Justices of the Levy Court of Baltimore County aforesaid, but the said John H. Dorsey, although often requested by the said Levy Court, to wit, &c. hath always hitherto refused, and still doth refuse, to pay or account for the same, or any part thereof; and so the said plaintiff says that the said John H. Dorsey hath not faithfully discharged his duties as one, &c.

To these breaches the defendants rejoined as follows: that as to the first breach assigned by the said State in its replication, they say that the said State, its action, &c. because they say that the Justices of the Levy Court of Baltimore County did not at any time during the year 1823, appoint the said John H. Dorsey collector of the tax mentioned in the condition of the said writing obligatory. And the defendants further say, that on the 19th day of February, in the year 1824, the following order was passed by the Justices of the Levy Court of Baltimore County, (setting out the order recited in the 2d plea,) and that after the passage of the said order, and on the 2d day of March next following, the said writing obligatory was executed * and delivered to the said Justices, and by them then approved and accepted, to wit, at the county aforesaid; 82 and this the said defendants are ready to verify; wherefore they pray judgment, &c.

And the said defendants, as to the second breach assigned by the said plaintiff, say, that the Justices of the Levy Court of Baltimore County, did not direct and appoint that the said John H. Dorsey, as collector aforesaid, should pay and account for the collections and assessments placed in his hands, to the Justices of the said Levy Court, on or before the first Tuesday in March, 1826, and that he the said John H. Dorsey had not notice of any such direction and appointment; and of this the said defendants put themselves upon the country.

To the defendants' rejoinder to the plaintiff's first breach, the plaintiff demurred generally, and the defendant joined in demurrer. An issue was joined upon the rejoinder to the second breach assigned by the plaintiff.

The County Court [HANSON, A. J.] sustained the demurrers to the defendants' 3d and 4th pleas, and also the demurrer to the defendants' rejoinder to the first breach, assigned in the replication of the plaintiff to the defendants' first plea; but overruled the demurrer to the second plea, and gave final judgment for the defendants, whereupon both parties appealed to this Court.

The cause came on to be argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

The following Acts of Assembly are referred to in this cause.

1794, ch. 53, enacts, that the Justices of the Levy Courts, in their respective counties, "are authorized and required on some day, between the 1st March, and the 1st October, annually, to meet at, &c. to adjust the ordinary and necessary expenses of their several counties; to impose an assessment or rate on all property within their

83 county, sufficient * to defray such county charge; and the said justices shall apportion such assessment or rate, and shall appoint a person or persons to collect the same, and every collector, before he acts as such, shall give bond, payable to the State, such as the said justices shall approve of, in double the sum to be collected, with condition," &c.

1817, ch. 22, after a preamble, stating that doubts are entertained of the validity of some of the Acts of the Court, because of their not being done within the time directed, sec. 1, enacts, "that the several assessments and levies of the public or county taxes, or charges made and imposed by the Levy Court of Baltimore County, and the several contracts or bonds made or taken in relation to the collection, or the payment or expenditure thereof, shall be held as effectual and valid as if the same had been fully completed, made or taken, within the time prescribed by law, provided the same shall not alter or affect the legal defence of the collectors against any claim or suit, which has been, or may be preferred against them, for anything done heretofore."

Sec. 2, enacts, that the Levy Court of Baltimore County, "be, and it is hereby authorized and empowered to meet for the transaction of public business, at, &c. and on, or at such days and times as the said Court shall consider expedient, between the 1st day of March, and the 31st day of December, in each and every year hereafter, and may continue by adjournment or otherwise, from day to day, or time to time, until the public business shall have been completed: Provided nevertheless, that the levy for each year shall be completed within the year."

Sec. 3, gave special power to complete the levy for the year 1817, appoint a collector, finish all the unsettled business of the county, and take a bond from the collector.

1817, ch. 142, sec. 2, authorized the Levy Court "to appoint as many collectors for the City of Baltimore as they may think necessary, who are to give bond in such penalty with such security as the said Court shall approve."

84 * Sec. 3, enacts, "that the said collectors shall each and every one of them finish and complete the collections of such of the assessments as may be placed in their hands, by the time prescribed by law, or assigned by the said Court for the completion of the same, and shall pay and account for the same in such manner, and at such times as the said Court shall direct or appoint."

1817, ch. 182, authorized the Levy Court of Baltimore County to appoint as many collectors as they deemed necessary to collect the county tax for the year 1817, and declared that they should give such bonds as the Court should prescribe.

1823, ch. 32, enacted, "that the Levy Court of Baltimore County be, and they are hereby authorized and empowered to make and close the levy of the said county for the year 1823, on or before the 1st day of March, 1824." Passed 31st December, 1823.

Williams, (District Attorney of U. S.) and *Gwynn*, for the appellant, referred to 7 *H. & J.* 79, 339, 343; 2 *H. & J.* 45; 1 *Kent Com.* 431; 2 *Johns. Dig.* 217; 11 *Johns. R.* 182; 20 *Ib.* 153; *Cox's Dig.* 109; 1 *Chitty Pl.* 326; 5 *Com. Dig. Plea. C.* 46; 2 *Harr. Ent.* 350, 408; Acts of 1823, c. 32; 1817, c. 142, s. 2; 1826, c. 217; 1827, c. 23; 1794, c. 53; 1817, c. 2, 3; 1823, c. 32.

Gill, for the appellee, referred to the same Acts of Assembly and to *Levy Court vs. Merryman*, 7 *H. & J.* 88.

* BUCHANAN, C. J. delivered the opinion of the Court. John H. Dorsey, one of the defendants, was appointed by the Levy Court of Baltimore County, on the 19th of February, 1824, one of the collectors of the county tax for the City of Baltimore for the year 1823, and on the 2d of March, 1824, he gave his bond to the State conditioned for the faithful discharge of his duties as such collector, with the other defendants as his sureties. Upon that bond this suit was brought, to which the defendants pleaded. [Here the Judge referred to the pleadings and judgment of the County Court as before set forth, and then said]—The question arising upon the demurrer to the second plea is, whether the Levy Court of Baltimore County, had any authority to appoint collectors of the tax, imposed for the year 1823, and to receive and approve their bonds, at any time after the 31st of December of that year. The 2d sec. of the Act of 1817, ch. 22, authorizes the Levy Court of Baltimore County, to meet for the transaction of public business, at such place in said county, and on, or at such days and times, as the said Court shall consider expedient, * between the first day of March and the 31st day of December, in each and every year thereafter, and to continue by adjournment or otherwise, from day to day, or time to time, until the public business shall have been completed—with the proviso. "provided nevertheless, that the levy for each year shall be completed within the year." By the 2d sec. of another Act of the same year, ch. 142, the Levy Court is directed to appoint a number of collectors of the tax, who are required severally to give bond to the State, in such penalty, and with such security as the Court shall prescribe and approve, conditioned for the faithful discharge of their duties as such. Upon which bonds suits are authorized to be brought by the Levy Court, or any person or persons interested therein. And by the Act of 1823, ch. 32, authority is given to the Levy Court of

Baltimore County, to make and close the levy for the year 1823, on or before the first day of March, 1824.

In the *State, use of Levy Court, &c. vs. Merryman*, 7 H. & J. 79, it was decided by this Court, that under the Act of 1794, ch. 10, authorizing the Justices of the Levy Courts of the several counties in the State, "to adjourn their respective Courts from time to time, for the purpose of laying the levy;" and the Act of the same year, ch. 53, requiring them "to meet on some day between the 1st of March, and the 1st of October annually, to adjust the ordinary and necessary expenses of their several counties, &c.; and to impose an assessment, &c. sufficient to defray such charges," and to "appoint a person or persons, to collect the same," they had no authority to impose an assessment, after the first of October, or to adjourn beyond that time. And it is perfectly clear, that under the proviso of the 2d sec. of the Act of 1817, ch. 22, the Levy Court of Baltimore County, could not have imposed the assessment for the year 1823, after the 31st of December of that year, but for the Act of 1823, ch. 32, extending the time to the 1st of March, 1824. It is supposed, and the course of the Legislature shows the understanding to have been, that the * Levy Court, was equally restricted in relation

91 to the appointment of collectors. The 3d sec. of the Act of 1817, ch. 22, passed 8th January, 1818, makes provision for completing the levy, and appointing a collector for the year 1817, and finishing the unsettled business of Baltimore County for that year, which would have been unnecessary in relation to the collectors, if the Levy Court could have appointed a collector after the 1st of October, 1817. And it is contended that under the 2d sec. of the same Act, authorizing the Levy Court to meet on some day between the 1st of March, and 31st December annually, for the transaction of public business, they were restricted in the appointment of a collector to some time between those periods, and that the appointment of John H. Dorsey, on the 19th of February, 1824, as collector of the tax for the year 1823, was illegal and void. But we do not think so. The collectors are required to give bond in such penalty as the Court shall prescribe, and as the amount of the penalty of the bonds to be given, cannot be ascertained before the assessment is made by which it must be regulated, it would seem as if the law looked to the assessment being made, before the appointment of the collectors. It may therefore well be a question, whether the Act of 1823, ch. 32, extending the time of making the levy for the year 1823, to the 1st of March, 1824, would not of itself, necessarily have carried with it, an extension of the time for appointing the collectors; and we are inclined to think it would, for there could be no necessity for appointing collectors, before the assessment was made. But be that as it may, the 2d section of the Act of 1817, ch. 22, does not restrict the power of appointing collectors to a time within those limits. Inconveniences had grown out of the restriction before existing; legislation had been found necessary to make valid, appointments of collectors, and

other Acts of the Levy Court, not within the time prescribed, and to authorize the appointment of collectors after the limited time; to prevent which thereafter, seems to have been one of the objects of the 2d * section of 1817, ch. 22, which after authorizing the Levy Court to meet annually, between the 1st of March and the 31st of December, goes on to say, "and may continue by adjournment or otherwise, from day to day, or time to time, until the public business shall have been completed, provided nevertheless, that the levy for each year, shall be completed within the year." Thus plainly indicating, that although the levy for each year must be completed within the year, yet that other parts of the public business need not be, but for the completion of which they are permitted to adjourn from day to day, &c., beyond the end of the year, if it should be found necessary. The proviso obviously showing, that completing the levy, was the only thing absolutely required to be done within the year. And though it would be unnecessary to appoint collectors, if the levy should not be made, yet that furnishes no reason for a different understanding of that section, for the law presumes that the Levy Court will always do their duty, by completing the levy within the time prescribed—and the Act of December, 1823, ch. 32, provided against the contingency of their being no levy imposed for the year, by extending the time of imposing it, to the 1st of March, 1824. And the Levy Court being constituted a corporation and body politic, there can on no principle, be any well founded objection to the execution, and acceptance of the bond of John H. Dorsey, on the 2d of March, 1824. 92

The suit being brought in the of the State, and entered for the use of the Levy Court of Baltimore County, the demurrers to the third and fourth pleas, present substantially but one and the same question; which is, whether the Levy Court of Baltimore County, having become extinct, and another body politic, and corporate, created in its place since the bringing of the suit, the action can be sustained? When a suit is brought on a private bond, &c. for the use of an individual, the individual for whose use it is entered, is not the legal plaintiff; the use is only entered for the protection of his equitable interest, and if he dies pending the suit, his * death is not the subject of a plea, nor is there for the purposes of the suit, any necessity for suggesting his death, but the suit goes on, as if he was still living, or the use had never been entered. 93 The judgment is rendered in the name of the nominal, the legal plaintiff; and it is nothing to the defendant who may be entitled to the equitable interest. And we can perceive no reason, why in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference. In either case, the suit must be brought in the name of the obligee. In the case of a private bond, the individual obligee is the legal plaintiff for the use of the person having the equitable interest; and

in the case of a bond to the State, (as here) the State is the legal plaintiff; and there is no necessity for the purposes of the suit, to enter the use, whether it is brought for the benefit of an individual or a corporation; nor if entered, does it make any difference to the defendant, how it may vary or change as to the person asserting the same right. It does not affect his defence, nor can any change of the use become a fit subject of plea. The declaration or replication, in case of a bond with a collateral condition, as this is, assigns the breach and discloses the use, or for what the suit is brought, and the defendant being thus advised, shapes his defence accordingly. The judgment is in the name of the State, and will, be for the use of whoever is entitled to the beneficial interest. We think the third and fourth pleas therefore bad, and that they were properly demurred to.

What has been said in relation to the second plea, applies equally to the rejoinder to the first breach, assigned in the replication to the first plea; with the addition that the rejoinder being of the matter of the second plea, it is clearly a departure from the defendant's first plea of general performance. It has, however, been contended, that the failure by John H. Dorsey, to finish and complete the collections of the tax imposed for the year 1823, within one year and six months

94 after the delivery to him of a copy of * the account of assessments, &c. was not alone a breach of the condition of the bond, and therefore that the first breach assigned in the replication is insufficient, in not also stating that he did not pay or account, &c. and that we must mount up to the first fault. But we do not perceive the force of the objection. The Act of 1794, ch. 53, requires that a collector shall proceed to collect the tax, &c. within six months after having received the assessment lists, &c.; and the 3d section of the Act of 1817, ch. 142, requires that he "shall finish and complete the collections by the time prescribed by law, or assigned by the Levy Court for the completion of the same," "and shall pay and account for the same, in such manner and at such times as the Court shall direct and appoint." Taking the two laws together then, (and they are parts of the same system) a collector is required to finish and complete the collections within six months after having received the assessment lists, &c. or by the time assigned by the Levy Court for the completion of the same, and also to pay an account for the same, in such manner and at such times as the Court shall direct and appoint. Here then, are two distinct duties required to be performed; one to finish and complete the collections within six months, &c. or by the time assigned by the Levy Court—and the other to pay and account for the same, in such manner, and at such times as the Court shall direct; the neglect to perform either of which, is a violation of the condition of the bond, for which an action will lie. And it was not necessary to sustain this suit, to add to the failure by John H. Dorsey to finish and complete the collections, &c.

(which is the first breach assigned) a neglect to pay and account, &c. which is, of itself, a separate and distinct breach of duty. Here the breach assigned is, that he did not finish and complete the collections within one year and six months, &c. which covers the whole time prescribed by law; the Act of 1815, ch. 173, allowing to collectors one year after the expiration of the time for which they are appointed, to collect the balances that may be due to them, in

* no way relieving them from their liability or their bonds for not finishing the collections within six months; but only giving them for their own benefit and security, the privilege of collecting what they had neglected to collect in due time, in the same manner in which they might have made the collections within the time prescribed, which otherwise they could not have done. **95**

We concur in opinion with the Court below, on the demurrers to the third and fourth pleas, and rejoinder to the first branch assigned in the replication; but dissent from the opinion expressed on the demurrer to the second plea.

Judgment reversed, and procedendo awarded.

THE STATE vs. SCHARFF *et al.*

In an action upon a collector's bond given to secure the collection of taxes, the collector cannot place his defence on the non-delivery, by the clerk of the County Court, to him, of the rate of the assessment and list of taxable inhabitants, unless he states in his plea, that he had applied for the rate and list to the proper officer, and that he either refused or neglected to furnish them. It is the duty of the clerk to deliver the lists at his office, where all his official acts are done, and the collector should apply for them there.

THIS was an appeal from Baltimore County Court, decided at June, 1829. It was argued before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

By *Taney*, (Attorney-General,) and *Gill* for the State.

No counsel appeared for the appellee.

The opinion of the Court, deciding the above question, was delivered by ARCHER, J.

* W. R. GLASGOW, Adm'r of BROWNING vs. J. SANDS, **96**
Trustee of BAILEY.—December, 1830.

The Commissioners of insolvent debtors for the City and County of Baltimore, after having appointed a permanent trustee, and certified to Baltimore County Court, that the debtor hath not complied with the terms and conditions of the insolvent laws, may, upon the neglect of such

trustee to give bond within a reasonable time, appoint a new permanent trustee. (a)

The *choses in action* of a deceased wife, vest in the trustee of her surviving husband, on his application for a discharge under the insolvent laws, although the husband is reported against, and does not obtain a final release.

APPEAL from a decree of the Orphans' Court of Baltimore County. John Sands, as permanent trustee of George W. Bailey, filed his petition in the Orphans' Court of Baltimore County, to recover from the appellant a sum of money which he alleged was due to Bailey prior to his insolvency, from Browning's estate. The following statement, exhibits the whole case :

"It is admitted that William R. Glasgow was, on the 8th September, 1826, appointed by the Orphans' Court of Baltimore County, administrator *d. b. n., c. t. a.* of P. G. Browning, then deceased; that on the 21st of September, 1826, Glasgow, as administrator, settled an account of his administration by which he was indebted to the said deceased's estate the sum of \$1,532.82; that Mary Ann Browning, daughter of said P. G. B. became and was entitled under the will of her father, to one-sixth part of the said balance, being the sum of \$255.40 $\frac{1}{3}$; that said M. A. B. was, after the death of her father, lawfully married to a certain George W. Bailey; that before payment of any part of the said sum of \$255.40 $\frac{1}{3}$, she departed this life; that after the death of his wife and before payment of the said sum of \$255.40 $\frac{1}{3}$ or any part thereof, and on the 7th December, 1826, G. W. B. then a resident of the City of Baltimore, applied to the

97 commissioners of insolvent debtors in and for the City and County of Baltimore, for the benefit of the insolvent laws, and obtained a personal discharge, and on the same day, the said John Sands was appointed by the said commissioners, provisional trustee of the said G. W. B. and as such gave bond with security; that on the 15th January, 1827, a certain Ritson Browning was appointed by the said commissioners, the permanent trustee of the said G. W. B. but never gave bond as such permanent trustee, and no deed of assignment was executed by said John Sands to said R. B.; that on the 21st day of April, 1827, the said commissioners made the following report:—"In the case of George W. Bailey, an applicant for the benefit of the insolvent laws of Maryland, the undersigned commissioners of insolvent debtors for the City and County of Baltimore, in pursuance of the Act of Assembly, do report to Baltimore County Court, that having diligently inquired and examined into the nature and circumstances of the said application, it appears, upon such examination, that the said Bailey hath not complied with the terms and conditions of the said insolvent laws, and hath not

(a) Cited in *Glenn vs. Karthaus*, 4 G. & J. 392; *Bond vs. Conway*, 11 Md. 516; *State vs. Reaney*, 18 Md. 239.

acted fairly and *bona fide*; and the said commissioners now return to the office of the clerk of the said Court, there to be recorded, the schedule, and all the proceedings which have been had before them in the matter of the said application. Given under our hands this 21st April, 1827, &c.”

It is further admitted, that on the 10th of May, 1828, the said John Sands, who was recommended by a majority of the creditors of the said G. W. B. was appointed by the said commissioners the permanent trustee of the said G. W. B., and as such gave bond, with security, which security was approved of by the said commissioners, and a copy of which bond is as follows, &c. “That after the application to the said commissioners of the said G. W. B., and on the 14th February, 1827, Bailey executed and delivered a release to Glasgow, in consideration of \$50, of his claim in right of his wife, under her father’s will. That at the time the said G. W. B. signed the release, there was written on * the same, and signed by William T. Browning, a memorandum, guarantee- 98
ing the said Glasgow, from any claim from R. B. as trustee of Bailey. It is further admitted that the release, together with the memorandum thereon, was delivered to W. R. G. on the day it bears date, and that W. R. G. then knew that G. W. B. had applied for the benefit of the insolvent laws, and was informed by Bailey that he intended to withdraw his application, which was in fact never done.”

Upon the foregoing statement of facts, the parties, John Sands and William R. Glasgow, pray the opinion of the Orphans’ Court of Baltimore County, as to the right of said W. R. G. to be allowed in the settlement of his second account with the Orphans’ Court, the sum of \$255.40½, as so much money paid by him to said G. W. B., and as to the right of said John Sands to a decree or order, directing the said W. R. G. to pay over to him the said J. S. the sum of \$255.40½, with interest from the 21st day of September, in the year 1826.

The Orphans’ Court thereupon passed the following decree:

“The Court having considered the petition, the answer thereto, and the statement of facts filed in the cause by the counsel of the parties, is of the opinion that the said William R. Glasgow, as administrator, is not entitled to a credit in his administration account, for the proportion of Mary Ann, the daughter of the said deceased, and who intermarried with George W. Bailey, and for which proportion the said Glasgow now claims to be allowed the sum of \$255.40½, as paid or satisfied to the said George W. Bailey; the Court being of the opinion, that inasmuch as it is admitted that no part of the same was paid by the said Glasgow, before the said Bailey applied for the benefit of the insolvent laws of this State, and had a trustee appointed, and that said Glasgow had information that said Bailey had thus applied for the benefit of the insolvent laws, that said Glasgow ought not to have paid any part of the same to the said Bailey. It is therefore on this ninth day of February, 1829, ordered and decreed,

that William R. Glasgow, administrator *de bonis non*, &c. of Peregrine G. Browning, deceased, pay to John Sands, trustee of the said George W. Bailey, the sum of \$255.40 $\frac{1}{2}$, being his proportion of the personal estate of the said deceased, in right of his wife, Mary Ann; and that he also pay costs."

From this decree Glasgow appealed to this Court.

This cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Williamson, for the appellant, cited 1816, ch. 221, sec. 2, 3; 1798, ch. 101, sub. 5, sec. 8; *Brown vs. Brice*, 2 H. & G. 24; *Leadenham vs. Nicholson*, 1 Ib. 278; *State vs. Krebs*, 6 H. & J. 34.

100 * *Gill*, for the appellee, cited *Schuyler vs. Hoyle*, 5 John. C. R. 206; *Stewart vs. Stewart*, 7 Ib. 247; *Hurt vs. Fisher*, 1 H. & G. 96; 2 Madd. 636; *Mitford vs. Mitford*, 9 Ves. Jr. 87; 2 Atk. 544; Act of 1819, ch. 84, sec. 1, 6; 1805, ch. 110, sec. 4.

DORSEY, J. delivered the opinion of the Court. By the argument in this case, two questions have been presented for our determination. First—whether the commissioners of insolvent debtors for the City and County of Baltimore, after having appointed a permanent trustee, and certified to Baltimore County Court that the applicant hath not complied with the terms and conditions of the insolvent laws, can, upon the neglect of such trustee to give the requisite bond within a reasonable time, appoint a new trustee? Secondly; whether *a chose in action* of a deceased wife is vested in the trustee of her surviving husband, an insolvent petitioner? By the Act of 1816, which provides for the appointment of these commissioners of insolvency, applications for the benefit of the insolvent laws were made to Baltimore County Court, who referred them to the commissioners, who, after proceeding to the appointment, first, of a provisional, and then of a permanent trustee, were required to examine into the nature and circumstances of all such applications, and if, upon such examination, it appeared that the petitioner had complied with the terms and conditions of the insolvent laws, and had acted fairly and *bona fide*, they were to report the same to Baltimore County Court, "and return the schedule and all proceedings which may have been had before them, to the office of the clerk of Baltimore County Court, there to be recorded." Under this law, the County Court were authorized to grant either a personal or final discharge to the petitioner: and if the examination by the commissioners resulted unfavorably to the applicant, no report thereof was to be made to the County Court, nor the schedule, or any of the proceedings before the commissioners returned.

* With a view to relieve Baltimore County Court from many
101 of the duties connected with applications for releases under our insolvent laws, to which it was still subject, the Legislature passed

the Act of 1819, ch. 84, investing the commissioners with the power of granting personal discharges, directing all applications of insolvents to be presented to them, instead of the County Court, and transferring to them all the powers of Baltimore County Court, or the Judges thereof, in relation to such application, except the granting of final discharges and trying allegations, &c. It also enjoins the commissioners, "in case it shall appear to them that the applicant hath not complied with the terms and conditions of the insolvent laws, to certify the same to Baltimore County Court, and also to transmit to the clerk thereof, all deeds of assignments executed by any such applicant, or applicants, and all such other papers relating to the estate of such applicant or applicants, and brought before them as they may deem it proper to have preserved and recorded." But it does not require, as in the case of their favorable report, a return of the schedule and all proceedings which may have been had before them. These, when their report is unfavorable to the applicant, remain in their custody, in order that they may comply with the injunction in the 6th sec. of the Act of 1819, which declares that "when the report of the commissioners shall be unfavorable to the applicant or applicants, the said commissioners shall cause the trustee to proceed in the execution of the trust, in the same manner, and subject to the same rules, regulations, and restrictions, as if the report of the said commissioners, had been favorable to such applicant or applicants. By the 4th sec. of the Act of 1805, ch. 110, which this Court has said is part of the insolvent system, applicable as well to Baltimore City and County, as to the rest of the State of Maryland, the trustee before he proceeds to act, shall give bond to the State of Maryland, for the use of the creditors of the petitioning debtor, in such penalty as the County Court shall direct, and upon his 'neglect to give bond *as aforesaid in a reasonable time, to be judged of by the County Court,' the County Court shall appoint such person as they shall think proper, in his place, who shall give bond as aforesaid." Upon viewing these several Acts of Assembly in connexion with each other, we think that the commissioners were authorized, under the circumstances in which they did so, to appoint John Sands the permanent trustee of Bailey, and to take bond from him as such. That the commissioners are invested with the power in the first instance, of appointing a permanent trustee, is obvious from the 3d sec. of the Act of 1816, and the Act of 1820, ch. 182; and by advertising to the 4th sec. of the Act 1805, and the 1st and 6th sections of the Act of 1819, we deem it equally clear, that they acted within the scope of their powers in making the appointment objected to in the case before us. The schedule of the petitioner in legal contemplation remained with the commissioners, and they only, perhaps, could therefore properly direct the penalty of the bond to be given by the trustee. By the Act of 1819, their investiture with all the powers of Baltimore County Court, is as full and comprehensive as language

could make it, and the peculiar and exclusive fitness of the commissioners for the discharge of the duty which they have assumed in this case, leaves no doubt in our minds of the legality or propriety of its exercise. Had the County Court have made the appointment, having no knowledge of the amount of debts due from or to the petitioner, or the value of his property, they would have had nothing to guide them in prescribing the penalty of the trustees' bond, which by law, it would be their duty to direct. Against the exercise of the power by the commissioners, no solid objection has been urged. 'Tis true in this case the schedule and all the proceedings before them, were returned to the clerk of the Baltimore County Court, to be recorded. But this does not vary the general principle applicable to like cases; it was done in obedience to no mandate of the law, in contemplation of * which the schedule and their proceedings

103 were still in their custody.

In our present decision, we mean to intimate no opinion as to the power of the commissioners to make an appointment like the present, where their report to the County Court has been in favor of the insolvent debtor, and the schedule and all their proceedings returned therewith.

The second question we deem too clear to require either authority or illustration to sustain our opinion upon it. By the Act of 1798, ch. 101, sub-ch. 5, sec. 8, it is enacted that "if the intestate be a married woman, it shall not, as heretofore, be necessary for her husband to take out letters of administration, but all her *choses in action* shall devolve upon her husband, in the same manner as if he had taken out such letters." Under the provision of the Act of Assembly, Bailey might have collected the claim now in controversy, and have applied the same to his own use; he was competent to release, compromise, assign or dispose of it, in any way he might see fit; and to all the purposes of this controversy, it is to be regarded in the same light as if it were a debt or *chose in action*, due to Bailey himself, and consequently vested in the appellee upon his giving bond as required by law. The statutory assignment of the petitioner's estate, is of all property which he has a claim, title to, or interest in, and of debts, rights and claims, which he has, or is in any way entitled to.

Decree affirmed.

FRIDGE *vs.* THE STATE, use of KIRK.—December, 1830.

In an action upon a bond entered into by a guardian appointed by the Orphans' Court, brought for the use of the ward, the mere fact that at the time of the guardian's appointment, a natural guardian was in existence, does not invalidate the appointment and so render the bond a nullity. That Court having jurisdiction to appoint a guardian in certain cases, even where there is a natural guardian, must be presumed to

have acted rightly, * when the question of the validity of the appointment arises incidentally, and nothing more than the existence of natural guardian appears. (a) 104

The judgment of a Court of competent jurisdiction, is, as to all matters decided by it, conclusive; and cannot be afterwards questioned by any other tribunal, when coming in incidentally. (b)

So the appointment by the Orphans' Court, of a person as guardian, who at the time was one of the Judges of the Court, cannot be afterwards questioned in an action upon his bond, though at the moment of the appointment, the Court could not have acted without the concurrence of the individual appointed.

Where the condition of a bond recited that A. was guardian, &c. neither the principal obligor nor a surety therein, in an action upon such bond, can deny that he was guardian in the face of the recital, nor set up as a defence any supposed irregularity in obtaining the appointment. (c)

(a) Cited in *Baltimore vs. Norman*, 4 Md. 360; *Lefever vs. Lefever*, 6 Md. 477; *Redman vs. Chance*, 32 Md. 51. Upon the death of the father, the mother becomes the natural guardian of her infant children, and upon qualifying and giving bond she is entitled to the exclusive control of their persons and property. But unless she does so qualify and give bond, her privilege will be lost without any formal renunciation, and it will be the duty of the Orphans' Court to appoint a guardian in her place. *Lefever vs. Lefever*, *supra*. Cf. *Keller vs. Donnelly*, 5 Md. 211. Under Rev. Code, Art. 52, sec. 3, the Orphans' Court may appoint a guardian to any infant entitled to property, although such infant may have a father or mother living, provided notice be given to the parent to show cause, &c. Such notice must be by summons if the party be within reach of the process of the Court, and by publication if beyond its jurisdiction. *Redman vs. Chance*, *supra*. Where the appointment of such guardian is made without due notice to the father or mother of such infant, the party aggrieved may not only appeal directly from the order making the appointment, but may also, by petition in the Orphans' Court, filed within thirty days after actual knowledge of the order of appointment, impeach the validity of the same. *Ibid*. As to suits by natural guardian or *prochein ami* of infants, see *Baltimore vs. Norman*, *supra*.

(b) Approved in *State vs. Horner*, 34 Md. 578, and *State vs. Robinson*, 57 Md. 503. See *Barney vs. Patterson*, 6 H. & J. 156, *note*; *Raborg vs. Hammond*, 2 H. & G. 83, *note*; *Lloyd vs. Burgess*, 4 Gill, 193.

(c) Approved in *Lloyd vs. Burgess*, 4 Gill, 192; *Milburn vs. State*, 1 Md. 12; *Gunther vs. State*, 31 Md. 28. Where in an action on a collector's bond, a plea set up the defence that M. "was not appointed collector on or before May 1, 1845," it was held that this plea was bad. "It admits the execution, delivery and approval of the bond; and this being so, it is not competent for the defendant to deny the contents of the bond, among which is to be found the fact, that he had been 'appointed collector for the State tax in St. Mary's County for the year 1845.'" *Milburn vs. State*, *supra*, affirmed in *State vs. Horner*, 34 Md. 578. The Orphans' Courts of the State have unquestioned jurisdiction to appoint guardians to minors, and where they have in any instance exercised this power; and the guardian has given bond, it does not lie in his mouth, or in the mouths of his sureties, to deny that he is guardian, or to aver the ward had no property subject to guardianship, even if the having of property be essential to the validity of the appointment. To this extent the sureties are clearly bound by the recital in the bond. But

An offer to pay only a part of a sum due, cannot avail a party as a tender. A creditor is under no obligation to accept less than the full amount due him.

A female, under the age of 21, cannot execute a release to her guardian, though she has capacity to receive payments from him at the age of 16—A release, which affords more protection to a guardian than a mere receipt, is in its nature and tendency to the prejudice of the infant, and opposed to sound policy. (d)

Some contracts made by infants are binding, such as contracts for necessities. Some are void; and others are voidable only, such as contracts that may be for the benefit of the infant. A contract that a Court can see and pronounce to be to the prejudice of the infant, is void. (e)

The promissory note of a guardian given to an infant female ward over the age of 16 years, is no payment.

It is the duty of a guardian to a female ward, on her arrival at the age of 16 years, to exhibit a final account to the Orphans' Court, and to deliver to the ward all her property in his hands. So far as the property of a ward in the guardian's hands consists of money, this constitutes a contract to pay money when she attained the age of 16, which is a day sufficiently certain in case of failure to pay, to entitle the ward to interest absolutely. (f)

In an action in the name of the State, the obligee in a guardian's bond, the non-age of the *cestui que use*, the ward, who was more than 16, is no defence, and does not form the fit subject of a plea. (g)

CROSS-APPEALS from Baltimore County Court. This was an action of debt commenced on the 31st of January, 1825, in the name of the State of Maryland, at the instance, and for the use of Eliza Ann Kirk, against Alexander Fridge, on a bond executed by one Owen Dorsey as the principal, and the said Fridge and another as

they are not responsible for any property their principal may have received as guardian without competent legal authority, and to which the ward had no title or claim during his minority. *Gunther vs. State, supra.*

(d) Cited in *Greenwood vs. Greenwood*, 28 Md. 385; *McClellan vs. Kennedy*, 3 Md. Ch. 252; *McKim vs. Handy*, 4 *Ib.* 237. See *Bowers vs. State*, 7 H. & J. 25, note; Rev. Code, Art. 50, secs. 180, 189; Act of 1882, c. 15.

(e) Approved in *Ridgely vs. Crandall*, 4 Md. 442; *Building Association vs. Herman*, 33 Md. 184; *Anderson vs. State, Ibid.*, 467; *Levering vs. Heighe*, 2 Md. Ch. 83; *Levering vs. Levering*, 3 Md. Ch. 368; *Cronise vs. Clark*, 4 Md. Ch. 406. As to contracts of infants see *Bramner vs. Franklin*, 4 Gill. 363.

(f) Cited, as to allowance of interest, in *Carter vs. Cross*, 7 Gill, 48; *Gott vs. State*, 44 Md. 339. See *Newson vs. Douglass*, 7 H. & J. 307; *Karthauss vs. Owings*, 2 G. & J. 261.

(g) In *Le Strange vs. State*, 58 Md. 45, the Court said that in the case in the text, "the action was in the name of the State on a guardian's bond, for the use of a female ward, brought before she had attained the age of 21 years, against one of the sureties on the bond. The question was distinctly made to and urged upon the Court, that the action could not be maintained because of the inability of the infant ward to sue. But the Court held it to be wholly immaterial that she was under age." See *State vs. Dorsey, ante*, m. p. 75, note.

sureties, dated the 11th of April, 1817, conditional for the
 * faithful discharge of the trust of the said Dorsey, as guardian **105**
 to the said Eliza Ann Kirk and Ann C. Kirk. All errors in pleading
 on both sides were released; and it was agreed that either party
 might raise any objection, which could be raised by any form of
 pleading, or on motion.

1. At the trial, the plaintiff read in evidence the guardian's bond,
 and an account settled by the guardian with the Orphans' Court of
 Baltimore County, on the 6th June, 1820, shewing a balance due E.
 A. Kirk of \$1,018.77. And proved that Eliza Ann Kirk, at the time
 of the trial of this cause, was under the age of twenty-one years.

Thereupon the defendant, by his counsel, read in evidence, the fol-
 lowing record: "The State of Maryland. At an Orphans' Court
 held for Baltimore County, at the Court-house, in the City of Balti-
 more, on the 11th of April, in the year 1817, present, Owen Dorsey,
 James Carroll, Jr. Esquires. Among other proceedings were the
 following, viz:—Ann Catharine Kirk and Eliza Kirk, orphan children
 of Thomas Kirk, deceased, come into Court, and the Court appoints
 Owen Dorsey their guardian, who here present in Court accepts the
 guardianship, and offers Alexander Fridge and John Mitchell, as his
 securities, who are approved of by the Court, and bond ordered to be
 executed accordingly. Bd. fd."—and also read the following account,
 which was duly proved. Baltimore County, sc.—The account of
 Owen Dorsey, guardian of Eliza Ann Kirk, orphan daughter of
 Thomas Kirk, late of said county, deceased.

1820, June 6. This accountant charges himself with the	
balance due on his last account ren-	
dered this date, amounting to,.....	\$1,018 77
1824, July 7. And with interest on \$922.25, from the	
21st March, 1820, to this date.....	237 57
	<hr/>
	\$1,256 34

* And he craves an allowance for the following pay-
 ments and disbursements: **106**

Cash paid at sundry times, &c.....	\$234 76
Cash paid his ward in full, as per release appears.....	1,021 58

Estate accounted for.....	<hr/> \$1,256 34
---------------------------	------------------

And also read a full and formal release from Eliza Ann Kirk to
 Owen Dorsey, as her guardian, acknowledged and recorded accord-
 ing to law. And proved, that at the time of the appointment of said
 Owen Dorsey, the mother of said Eliza Ann Kirk, was living, and
 that no process appeared to have issued to bring her before the
 Court, to renounce her right of guardianship.

Whereupon the plaintiff proved by one Fielder Israel, that a few weeks after E. A. K. arrived at the age of sixteen years, (as he understood from her mother,) she and her mother called upon said Owen Dorsey for a settlement; that said D. fixed a day to make such settlement, and on that day, the daughter and mother called; that D. then told them he had been disappointed in getting all the money, but that he had procured four or five hundred dollars, which she, Miss K. could take, and let the affair remain until he got the balance; that D. then counted out the money, and laid it on the desk which lay between said E. and him, and which money, she could have taken up at any moment. The mother and daughter both declined taking the money; the mother telling Mr. D. that her daughter did not want, nor had any use for the money, and that they preferred it all should remain in his hands (except fifty or sixty dollars for which the daughter then had immediate occasion,) and receive interest for it, inasmuch, as if the money was taken from Mr. D. it would be deposited in bank, and the daughter would not receive the benefit of interest. Mr. D. then said, he would keep * the money, and **107** pay interest therefor, and gave the daughter his note for the amount. He then took fifty or sixty dollars out of the money so counted down, which fifty or sixty dollars he paid to said E., the rest of the four or five hundred dollars he put into his pocket, and gave to said E., his promissory note for \$961.38, dated Baltimore, July 15th, 1824, payable on demand, with legal interest, on which, were endorsed a number of small payments, in all \$131.38; that Dorsey, before he gave such note, told E. and her mother, that E. must give him, D., a release, to enable him to settle his account in the Orphans' Court, which she consented to do; that D. directed witness to draw such release, who did so, but before he suffered E. to execute the same, he explained to her fully and minutely the nature and character thereof; and told her and her mother that the effect of it would be to discharge Mr. D. and his securities, on his guardian's bond and to retain only Mr. D.'s liability on the note; and after such explanation the said E. executed such release. The witness also proved, that after such note was given by D. to E. and such release executed, the said E. called and got several sums of money of D., all of which were credited on said note.

Whereupon the defendant, by his counsel, prayed the opinion of the Court, and their direction to the jury, as follows: 1. If the jury believed, that Eliza Ann Kirk had attained the age of sixteen years on the 15th day of July, 1824, and executed the release which has been given in evidence, with a full understanding of its effect and import, that then, this action cannot be maintained. 2d. That if the jury believe, that at the date of the appointment of Owen Dorsey as guardian, the said Eliza Ann Kirk had a natural guardian, that then the said Court exceeded its jurisdiction in making the said appointment, and that the bond being void, this action cannot be

maintained. 3d. That if the jury believe Eliza Ann Kirk is under the age of twenty-one years at this time, this action cannot be maintained. 4th. That if the jury believe Owen Dorsey, * the person appointed guardian, was the same Owen Dorsey who acted as one of the Judges of the Orphans' Court named in the certificate of appointment of guardian, which has been given in evidence, that then, this action cannot be maintained. 5th. That if the jury believe that Owen Dorsey, after the 15th day of July, 1824, when Eliza Ann Kirk attained the age of sixteen years, offered to pay, and counted out to the said Eliza Ann Kirk, the sum of four or five hundred dollars, which she declined to receive, and afterwards took the note of Owen Dorsey in preference, as given in evidence, that such tendering and counting out the money, was an extinguishment of the claim which she, the said Eliza Ann Kirk, might have had, to the extent of such sum as the jury may believe was so tendered. But the Court [ARCHER, C. J. and HANSON, A. J.] refused all and each of said prayers of defendant; and were of opinion that the plaintiff was entitled to recover, if the jury believed the testimony. The defendant excepted. **108**

2. The plaintiff then prayed the Court's direction to the jury, that upon the evidence in the first exception, the plaintiff is entitled to recover interest upon the balance decided to be due Eliza Ann Kirk, from the period the said balance became due, or at least from the commencement of this action. But the Court being divided in opinion, refused to grant said direction, or to direct the jury that the plaintiff was entitled to recover any interest, but left the question of interest to the jury, to be by them decided. The plaintiff excepted. There was a verdict, and judgment for the plaintiff, and an appeal by both parties to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ.

R. B. Magruder, for appellant, contended, 1. That the ward being of full age to receive her personal property, was of full age to do any act required or authorized * by law, to evidence, and acknowledge the receipt of her estate; and that the release executed by her, is a valid release. 1 *Thos. Co. Lit. (H)* 175; 170, note (28;) **109** 163, note (a;) 1 *Blk. Com.* 463; Act of 1798, ch. 101, sub-chap. 3, sec. 3; Act of 1715, ch. 39, sec. 13; Act 1798, ch. 101, sub-ch. 12, sec. 1, 15; 1809, ch. 168, sec. 1, 15; 1829, ch. 216, sec. 6, 7; 1 *Thos. Co. Lit.* 177; *Davis vs. Jacquin*, 5 *H. & J.* 109; *Bowers vs. The State*, 7 *I b.* 35, 36. 2. The Orphans' Court had no power to appoint a guardian, and exceeded its jurisdiction in so doing, because the ward had a natural guardian, who should have been called on to bond, and this should have appeared on the proceedings. 1798, ch. 101, sub-ch. 12, secs. 1, 2, 3, 20. To shew that the objection could be made in this Court, he cited *Bigely vs. Stearns*, 19 *Johns.* 39; *Spedden vs. State*, 3

H. & J. 251, 252 and 276 (*note.*) 3. That the ward being under the age of 21 years, at the trial of the cause below, and of course when the suit was brought, could not maintain the action. *Low and Gist*, (*note.*) 5 *H. & J.* 106; 1 *Thos. Co. L.* 175, (*H.*) 172, (*a.*) 4. That the appointment of Owen Dorsey as guardian, by two only of the Judges of the Orphans' Court, one of which Judges was the said Dorsey, was invalid, and therefore the bond of the guardian was void. 1798, ch. 101, sub-ch. 15, sec. 8. 5. The payment or tender, of part of the money claimed by the plaintiff below, made by the guardian in the manner set forth in the evidence, was an extinguishment of the claim of the plaintiff, *pro tanto.* 2 *Kent Com.*; 2 *Eden's Cases*, 72. Upon the question of interest on the plaintiff's appeal, he referred to *Newson vs. Douglass*, 7 *H. & J.* 453.

Johnson, for appellee, on the first point, cited *Low vs. Gist*, 5 *H. & J.* 106, *note* (*a.*); *Davis vs. Jacquin and Pomarait*, *Ib.* 100; *Bowers vs. State*, 7 *Ib.* 32. On the second and fourth point, he referred to the Acts of 1798, ch. 101, sub-ch. 12, sec. 1, 3; 1816, ch. 203, sec. 3. *Raborg vs. Hammond*, 2 *H. & G.* 50; 3 *Bac. Abr.* 50, *Title Ex'ors and Admin's*; *Barney vs. Patterson*, 6 *H. & J.* 182; *Taylor and McNeal vs. Phelps*, 1 *H. & G.* 492. He also cited 2 *Saund.* 212, and *note* 5; *James vs. Boyd*, 1 *H. & G.* 1; 2 *Kent Com.* 190, 192; *Bowers vs. State*, 7 *H. & J.* 36; *Kean vs. Boycott*, 2 *Hen. Black.* 511; 2 *Kent Com.* 194; 2 *Saund. Plea. and * Ev.* 840; 3 *Taunt.* 95; *Harding* 111 *vs. Spicer*, 1 *Camb.* 327; 2 *Saund. Plea. and Ev.* 836; *Karthauss vs. Owings*, 6 *H. & J.* 139; *Newson vs. Douglass*, 7 *H. & J.* 418.

BUCHANAN, C. J., delivered the opinion of the Court. The suit is by the State on a guardian's bond, for the use of a female ward, instituted after she attained the age of sixteen, but before she arrived at twenty-one, against one of the sureties in the bond. It is insisted on the part of the defendant below, First, That if Eliza Ann Kirk, for whose use the action was brought, had a natural guardian at the time of the appointment by the Orphans' Court of Baltimore County, of Owen Dorsey, the principal in the bond as her guardian, the Court exceeded its jurisdiction in making the appointment, that the bond is void, and the action cannot be maintained. Secondly, That if Owen Dorsey, the person appointed guardian, was at the time of making the appointment sitting as a Judge of the Court, with only one other Judge, the appointment was invalid and the bond void. Thirdly, That supposing Owen Dorsey to have been regularly appointed guardian, if after Eliza Ann Kirk attained the age of sixteen years, he offered to pay, and counted out to her the sum of four or five hundred dollars, which she refused to receive, and afterwards took the note of Dorsey in preference, such offering and counting out the money, was an extinguishment of her claim, to the extent of the sum so offered and counted out. Fourthly, That if after Eliza Ann Kirk attained the age of sixteen years, she executed to Dorsey

a release of all claims and demands, with a full understanding of its import and effect, the action cannot be maintained. Fifthly, That if she was under the age of twenty-one years at the time of instituting the action, it cannot be maintained; and evidence of the facts upon which these questions are raised, was offered to the jury, and is set out in the record.

* First then, suppose Eliza Ann Kirk had a natural guardian at the time of the appointment of Owen Dorsey as her guardian, were that appointment and the bond given in pursuance of it void, for want of jurisdiction in the Orphans' Court? **112**

By the Act of 1798, ch. 101, sub-ch. 12, sec. 1, the several Orphans' Courts, had the power to appoint a guardian to an infant until the age of twenty-one years if a male, and until the age of sixteen years if a female, if such infant has no natural guardian, nor guardian appointed by last will. And by the 3d sec. of the same sub-ch. 12, on the application of any friend of an infant, &c. to call on any natural guardian or guardian appointed by last will, to give bond for the performance of his or her trust; and on failure or neglect of such guardian, to appoint another guardian. The distinction between an erroneous judgment by a tribunal having jurisdiction of the subject-matter, and the judgment of a tribunal having no cognizance of the subject, is well known and acknowledged. If the mother of the infant in this case, who is claimed to have been her natural guardian, had asserted her rights as such, and taken upon herself the management and conduct of the infant's estate in the Orphans' Court; or being called upon, had given bond for the performance of her trust, the Orphans' Court, with the knowledge of the existence of such a guardian acting in pursuance of her trust, could not properly during the continuance of her authority, have appointed another guardian, and thereby have divested her of her rights. And as the rights, and authority, and power over the property and person of the infant would be incompatible in two, such an appointment would have been void. If the natural guardian had assumed and entered upon her trust, and as such, taken upon herself the management of the estate of her ward in the Orphans' Court, the appointment of Owen Dorsey would have been an act not within the jurisdiction of that Court, no more than would be the appointment of a second guardian, while the prior appointment * of another by the same Court, was remaining in full force and unrevoked. Unless the natural **113** guardian had failed or neglected to give bond for the performance of her trust, on being called upon to do so, in pursuance of the 3d section of the 12th sub-chap. of the Act of 1798, ch. 101, or had been removed for cause, under the provisions of the 12th section of the sub-chap. 15, it would not have been the case of an erroneous judgment by a Court of competent jurisdiction, but the act of a tribunal having no cognizance of the subject, and therefore unauthorized and void, the Orphans' Court having no power to create a guardian of

its own appointment, in the case of an infant having a known, authorized, and qualified acting natural guardian. But though in relation to such a case, of a known, natural guardian asserting and exercising his rights, the Orphans' Court is without jurisdiction; yet the appointment of a guardian, being a subject ordinarily cognizable in that Court, and only excluded from its jurisdiction, by the circumstance of there being a natural guardian, or a guardian appointed by will, it does not follow, that the mere existence of a person ordinarily entitled to assume the office and trust of a natural guardian, is alone sufficient to divest it of its jurisdiction. That person, though known to the Orphans' Court, may nevertheless reject or abandon the trust; in which event, a case in which a guardian may be appointed, a case within the jurisdiction of the Court, is presented. That may have been the case here; the mother of the infant, who might have assumed the office of natural guardian, may have rejected or abandoned the trust; or on being required to give bond for the performance of her trust, may have failed, or neglected to do it; and if so, in either case, the Orphans' Court have the power to appoint another guardian. It does not indeed appear in this record whether there was or not, such an abandonment of the trust, or failure or neglect by the natural guardian to give bond for the performance of it; but the Orphans' Court having appointed another guardian, and there being nothing to show the absence of authority to

114 * do so, it is to be taken, that it acted within the sphere of its ordinary jurisdiction, and that what was done, was rightly done. And it not appearing to this Court, to be the act of a tribunal, having no cognizance of the subject-matter, it cannot be impeached here, coming thus incidentally in question.

And secondly, with respect to the appointment of Owen Dorsey as the guardian, he being present and sitting as one of the Judges of the Court, supposing it be so; yet being the act of a Court of competent jurisdiction, whether that act was correct and regular, or not, still it was the judgment, the act of that Court, the correctness or regularity of which, it is not for this Court collaterally to inquire into. The question of jurisdiction, is a question that may be examined into, and the acts of a tribunal having no jurisdiction may be reviewed by another Court; but the judgment of a Court of competent jurisdiction is, as to all matters decided by it, conclusive, and cannot be afterwards questioned by any other tribunal when coming in incidentally. This is a doctrine too well established to admit of being enlarged upon. Besides Owen Dorsey having given his bond, in which he is stated to be the guardian of E. A. K. and having obtained possession of her property, it would not in a suit against him, have lain in his mouth to deny that he was guardian, in the very face of the recital in his bond, or to set up any supposed irregularity in obtaining the appointment; the recital in the bond being evidence as

against him, that he was guardian. Nor does it lie in the mouth of his surety, against whom, the recital is equally evidence.

Thirdly, the offer by Owen Dorsey to pay to E. A. K. four or five hundred dollars, and counting out the money, cannot avail the party here as a tender, being an offer of only a part of the amount due, and a creditor not being under any obligation to accept less than the full amount; nor is it insisted upon as a tender. And if it was a tender, it could not, as such, operate as an extinguishment of the claim *pro tanto*. But it is contended, that it amounted to *and must be considered as a payment, to the extent of the 115 sum so offered and counted out. But surely her express refusal to receive the part offered, and his agreeing to keep and pay interest upon the whole amount, could not constitute a payment, to the amount of the sum offered, and consequently was no extinguishment of any part of the claim.

Fourthly, by the Act of 1798, ch. 101, sub-ch. 12, sec. 1 and 15, power is given to the Orphans' Court to appoint a guardian to an infant female, until she attains the age of sixteen or is married, when the guardianship ceases; and the ward or her husband, as the case may be, is entitled to receive from her guardian all her property. It has been decided by this Court in *Davis vs. Jacquin & Pomarait*, 5 H. & J. 100, that although that Act confers on an infant female a new capacity, the capacity to receive from her guardian the whole of her estate, it does not take away or destroy her state of legal minority, nor remove her other disabilities; but leaves them as they were before, except in relation to the disposition of her real estate, which she is empowered to do by will at the age of eighteen years. And the same principle is recognized in *Bowers' Admr vs. State, use of Dryden*, 7 H. & J. 32. The legal infancy, therefore, of a female, not ceasing at the age of sixteen, Eliza Ann Kirk, not having attained the age twenty-one years, at the date of the release set up in this case, was in reference to her capacity to execute such an instrument, in contemplation of law, a minor.

Some contracts made by infants are binding, such as contracts for necessities. Some are void, and others voidable only, such as contracts that may be for the benefit of the infant. But a contract that a Court can see and pronounce to be to the prejudice of the infant, is void. And such, we think, is clearly the character of the instrument in question. It was executed on the ward's receiving from her guardian his promissory note, for the amount belonging to her in his hands; and being a release in the language of it, "of and from all and every action, suit, claim or demand, &c." if * good, 116 it discharged him and his sureties from all responsibility on his guardian's bond, a higher and a better security than his promissory note alone, and was therefore to the prejudice of the infant. But independent of the peculiar circumstances of this case, we think a female infant between the ages of sixteen and twenty-one, incap-

able of executing a valid release to her guardian; considering from the character of the relation subsisting between the parties, the state of ignorance in which an infant usually is in relation to the condition of her affairs, and the conduct of the guardian in the execution of his trust, and the inducements to a guardian who has abused his trust, to seek that shelter behind a release improperly obtained, which a mere receipt would not afford him, that such instruments are in their nature and tendency to the prejudice of infants, and opposed to sound policy.

Fifthly, it does not appear to us to be at all material, whether Eliza Ann Kirk was of the age of twenty-one or not, at the time of instituting the suit. She is not the legal plaintiff; the bond is to the State, the suit was brought in the name of the State, the legal plaintiff, and she is only the *cestui que use*; and it was not necessary for the purposes of the suit, to enter the use at all; though it is usually done in such cases, it might have been carried on as well without it, as with it. And being done, her non-age could not form the fit subject of a plea, the action not being brought in her name. We cannot distinguish this from the case of the *State vs. Dorsey and others*, ante 75. The same principle pervades both cases. We concur therefore with the Court below on the first exception.

The question arising upon the exception taken on the part of the plaintiff below is, whether the plaintiff is entitled to interest on the balance found to be due to Eliza Ann Kirk, the *cestui que use*, and from what period? Which question the Court below refused to decide, but left it to the jury to determine. The dealings between man and man are in their nature so various, that scarcely two cases occur * presenting the same aspect. The question of interest **117** therefore, has been found to be one, not susceptible of the application to it, of any fixed and general rule, each case mainly depending upon its own peculiar circumstances.

This same question of interest, however, arose and was discussed in *Newson's Adm'r vs. Douglass*, 7 H. & J. 417, in which it was decided by this Court, that the question was properly submitted to the jury by the Court below, to be determined by them according to the equity and justice appearing between the parties, on a consideration of all the circumstances of that particular case, as disclosed at the trial. But it is there said, "there are indeed cases, not to speak of bonds, &c., in which interest is recoverable as of right—such as on a contract in writing to pay money on a day certain; as in the case of a bill of exchange or a promissory note; or on a contract for the payment of interest, or where the money claimed has actually been used," which in any aspect of this case would seem to be applicable to it. The guardian gave his bond for the performance of his duty as such, and by law it was his duty, on the arrival of the ward at the age of sixteen, to exhibit a final account to the Orphans' Court, and to deliver to the ward all her property in his hands. Here

was a contract, (so far as the property of the ward in his hands consisted of money,) to pay money when she attained the age of sixteen, which was a day sufficiently certain. The proof is, that when the ward had arrived at the age of sixteen, she called on the guardian for a settlement on a day appointed by him for that purpose; when he told her, that, "he had been disappointed in getting all the money, but had procured a part, which he offered to her;" that she declined taking it, preferring it remaining in his hands on interest, and that he agreed to keep the money on interest, and after paying her fifty or sixty dollars, gave her his promissory note for the balance due to her in his hands with interest. Here then is a case, in which the money was actually used; for he had so applied or disposed of it, that when * called on for a settlement, he could only procure a part of it; it was not, therefore, lying by him unused. There was too, an express contract for the payment of interest, independent of the promissory note, which has a provision for the payment of interest, and is evidence of his keeping the money on those terms. The plaintiff is therefore, entitled to recover interest from that time, on the amount of the balance retained by the guardian in his hands. And the Court below erred we think, in not having so directed the jury, and in leaving the question to be decided by them. **118**

Judgment reversed, and procedendo awarded.

—

JACOB MOATS vs. DANIEL WITMER.—June, 1831.

F. sold a tract of land to W. reserving the grain then in the ground. This was to be thrashed in the barn, and the straw left for W's use. While the grain was growing, F. sold it to M. who had notice of the first agreement. M. cut the grain and stacked it upon the farm, but afterwards entered upon the premises then in the possession of W. and hauled away the grain in the straw before it was thrashed, thrashed it; and did not return the straw. In an action of trespass *q. c. f.* brought by W. against M.—*Held*, that if the jury believed M's entry was for the purpose of removing the grain and thrashing it off the premises, that it was a trespass *q. c. f.* and the plaintiff might recover damages for that, and the straw which was removed and not returned. (a)

Where a party is a trespasser or not, according to the intention with which he enters upon land, then, whether he is a trespasser or not, is a question for the jury exclusively.

Acts which amount to trespass *vi et armis*, and which are a component part of one outrage, may be united with a claim for the trespass *q. c. f.* and damages for both recovered in the same action.

APPEAL from Washington County Court. This was an action of *trespass quare clausum fregit*, brought by the appellee, against the appellant, on the 5th of March, 1828.

(a) Cited in *Long vs. Buchanan*, 27 Md. 519; *George's Creek vs. Detmold*, 1 Md. Ch. 880.

The defendant pleaded not guilty, and issue was joined.

At the trial the plaintiff read in evidence to the jury the following agreement, to wit: "Articles of agreement * made this 11th **119** of November, 1826, between Daniel Witmer of the one part, and Henry Funk of the other part, witnesseth:—that the said Henry Funk excepts the grain in the ground, on the land conveyed by said Henry Funk to Daniel Witmer by a deed bearing date the 23d of October, 1826, last past. The straw to be left on the land, and thrashed in the barn of the said land, for Daniel Witmer's farm use, &c." And likewise read to the jury the following conditions of sale, signed Henry Funk, and dated May 25th, 1827. "The condition of this present public sale is such, that the highest bidder or bidders shall be the buyer or buyers. The grain will be sold by the acre, and thrashed in the barn on the premises, and the straw left for the use of Daniel Witmer, and stacked in and round the barn of said Witmer. A credit of six months will be given the purchaser, by giving his note with approved security." Of which conditions of sale it was proved the defendant had notice. It was admitted that the plaintiff was in possession of the land, in the said agreement mentioned as purchased of Funk, and that the defendant in May, 1827, purchased the crop of grain in the ground from the said Funk, at public sale, when the aforesaid conditions of sale were read in the presence of the defendant, and that he cut the said grain and stacked it in the field where it grew. The plaintiff then proved that the defendant afterwards entered on the premises and hauled away to his own farm the grain in the straw, before it was thrashed, and there thrashed it, and did not return the straw to the premises. The defendant then prayed the Court to direct the jury, that as he had a right of ingress and egress, to cut the grain, and get it out, and remove it, that the plaintiff is not entitled to recover in this action; on account of his removing the grain with the straw before it was thrashed; and secondly, if the Court should be of opinion that the plaintiff is entitled to recover for the trespass, he is not entitled to recover for the straw removed, before it was thrashed. Which direction the Court refused to give, but instructed the jury, that if **120** the defendant * entered on the premises for the purpose of removing the grain in the straw, and thrashing it off the premises, and did so remove, and thrash it, and did not return the straw to the premises, whereby it was lost to the plaintiff, that then, the plaintiff was entitled to recover for the trespass charged in the declaration.

The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before MARTIN, STEPHEN, and DORSEY, JJ.

Anderson, for the appellant, contended: 1. That the defendant having a right to enter on the premises to get out his grain, was not guilty of the trespass complained of. On this point he cited, *Shafer vs. Smith*, 7 H. & J. 67; *Bul. N. P.* 89; 3 *Stark. Ev.* 1451; *The King vs. Commissioners*, 2 Maul. & Selw. 79. 2. Supposing a trespass to have been committed, still the plaintiff was not entitled to recover damages in this action, for the straw was carried away before it was thrashed. 2 *Wheat. Selw.* 1035, 1036; 3 *Stark. Ev.* 1444.

Price, for the appellee, referred to 3 *Stark. Ev.* 1444; *Dexter vs. Hager*, 10 Johns. 256.

DORSEY, J. delivered the opinion of the Court. The direction given to the jury by the Court below, was "that if the defendant entered on the premises, for the purpose of removing the grain in the straw and thrashing it off the premises, and did so remove and thrash it, and did not return the straw to the premises, whereby it was lost to the plaintiff, that then the plaintiff was entitled to recover for the trespass charged in the declaration." In this instruction, we can discover nothing of which the appellant ought to complain. It concedes to him more than he had any right to demand; and denies to him nothing on which he had a right to insist. 'Tis true that, under the contract *between Henry Funk and Daniel Witmer, he was authorized to enter on the land for the purpose of cutting and securing the grain, thrashing it in the barn, and removing it away, but for no other purpose. The moment he entered, in the language of the Court, "for the purpose of removing the grain in the straw, and thrashing it off the premises," his right of ingress and egress no longer protected him, and he stood in no better predicament than any other trespasser. Upon this ground the Court were also right in refusing the first part of the instruction prayed for by the appellant; to wit: "that as the defendant had a right of ingress and egress to cut the grain, and get it out, and remove it, that the plaintiff is not entitled to recover in this action, on account of his removing the grain with the straw before it was thrashed." In granting this, they would have trenched upon the province of the jury in determining, *quo animo*, the defendant entered. If his entry was made for the purpose of getting out and removing the grain conformably to the agreement between Funk and Witmer, although after he entered he may have changed his mind and committed the outrage complained of, an action of trespass *quare clausum fregit* could not be maintained against him. It is the intention of the defendant which stamps the character of his entry, and this the jury only are competent to find. In granting this branch of the instruction too, we think that the County Court would have erred on another ground. Admitting the acts of the defendant as far as the land was concerned to be lawful, yet according to our construction of the articles of agreement between Funk and Witmer,

the latter had such a property in the straw as rendered him competent to maintain an action of trespass *vi et armis* for such a taking and carrying away of the same as is presented by the facts set forth in the bill of exceptions. The true intent and meaning of the agreement was, that the grain should be the property of Funk, the straw of Witmer: and their respective possessions were co-extensive with their rights. Witmer's right to the straw was absolute, * his possession unqualified, but as it might be lawfully invaded by Funk, or those claiming under him, with a view to its being thrashed in the barn on the premises. For this purpose, and no other, had they a right to touch or remove it. Suppose Witmer, owning both grain and straw, had sold the grain to one person, and the straw to another, (subject to the same restrictions as to thrashing out, as are prescribed in this case,) and a stranger were to seize and carry away both, can it be doubted, that against such wrong-doer, each owner might maintain a separate action of trespass *vi et armis*? In the case at bar the principle is the same.

The second branch of the defendant's prayer, "that if the Court should be of opinion that the plaintiff is entitled to recover for the trespass, he is not entitled to recover for the straw removed before it was thrashed," is put to rest by the interpretation we have given to the contract between Funk and Witmer. As whatever may be the law as to a plaintiff's right to recover substantive damages for acts of the defendant not amounting to a trespass *vi et armis*, but which may be the foundation of a separate action on the case when charged in the declaration in trespass *quare clausum fregit*, as a component part of the outrage complained of, there cannot be a doubt, that if such acts do amount to a trespass *vi et armis*, they may be united with the action of trespass *quare clausum fregit*, and the same damages be recovered therefor, as if a separate action had been brought. And the plaintiff is entitled to a full indemnity for both or either of the trespasses accordingly, as his case may be sustained by proof. 3 Stark. Ev. 1451, 2 and 3, and the cases there referred to. 5 B. & A. 220.

Seeing no error in the proceedings of the County Court, to which the appellant has any right to except, we affirm their judgment.

Judgment affirmed.

123

* STOCKETT vs. ELLICOTT.—June, 1831.

Upon a plea of usury to an action upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items, the interest as calculated, exceeded 6 per cent. The receipt for the bill, at the foot of the account, stated, that in "case of error either way, should any be discovered," it should be corrected. Held, that this was no evidence of an usurious agreement.

Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction; and that intention, when it can be reached, must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side, and a borrowing on the other, at a rate of interest exceeding six *per centum*, the form given to the transaction is not material; no shift or device can take it out of the Act of Assembly. (a)

APPEAL from Anne Arundel County Court. This was an action of debt commenced on the 13th of January, 1825, by the appellees, George Ellicott, and others, as surviving partners of John Ellicott of John, against the appellant, Richard G. Stockett, on the following single bill: "I promise to pay unto Ellicott and Co., in one, two and three equal annual instalments, the sum of £594 3s. 9d. with interest from the date hereof, for value received, as witness my hand and seal, this 28th day of July, 1815."

The defendant pleaded usury, and payment, to which there were issues.

At the trial, the defendant in support of his plea of usury, read in evidence the account stated between the parties, and the receipt put thereon at the time of settlement, and for the balance of which the above single bill was given; and to show that in said account the plaintiffs had estimated and charged more interest than would have been allowed upon the principal sums, for the times for which credit was given, at the rate of six per cent. per annum, specified the charge in said account of £25 14s. 7d. as and for interest upon the principal sum of £509 1s. 1d. for the space of eight years, one month and five days; and also the charge of £9 14s. 4d. as and for interest upon a principal of £41 18s. 2½d. * for the space of three years, ten months and one day; and insisted that thereby the said 124 defendant was charged with interest above the rate of interest allowed by law, and that the same was evidence of usury.

At the foot of the account so read in evidence by the defendant, there was the following receipt, signed by the plaintiff: "July 28th, 1815—Received his note in full for the above account, it being understood, in case of error either way, should any be discovered, that it shall be corrected."

The plaintiffs then prayed the Court to instruct the jury, that there was not sufficient evidence of usury in the transactions between the parties, which instruction the Court (KILGOUR and WILKINSON, A. J.) gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

(a) Cited in *Duncan vs. Savings Instn.* 10 G. & J. 312. Cf. *Tyson vs. Rickard*, 3 H. & J. 81.

A. C. Magruder, and Alexander, for the appellant, cited Tyson vs. Rickard, 3 H. & J. 109; 2 Strange, 1246.
Johnson, for the appellees.

125 *BUCHANAN, C. J., delivered the opinion of the Court. This is an action upon a single bill, the defence relied upon was usury, and the case is brought up on an exception taken at the trial, to an instruction by the Court to the jury, "that there was not sufficient evidence of usury in the transaction between the parties."

Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction, and that intention when it can be reached, must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side, and a borrowing on the other, at a rate of interest exceeding six per cent. per annum, the form given to the transaction is not material; no shift, or device, can take it out of the Act of Assembly. Here the bill in question was given for the amount of an account rendered against the appellant, in which interest was charged upon the different items. Every item of principal charged in the account, is admitted; but it is said, that the interest charged on different items of principal, exceeded the rate of six per cent. a year, and therefore, that the bill being given for the whole amount, including the interest so charged, it was an usurious transaction.

Whatever might have been the case, if it had appeared that the alleged overcharges of interest were, by agreement of the parties, made and allowed, in consideration of forbearance, and giving day of payment to the appellant, of the several principal sums of money due from him, on which such charges of interest were made, there is in this record no evidence, express or implied, of any such agreement or intention, or tending to show, or prove any such *agreement or intention, without which there could have been no usury. The agreement, the intention of the parties, constituting a principal ingredient of usury.

But it is contended, that whether it was an usurious contract or not, was a question which ought to have been left to the jury, and that the Court did wrong in instructing them, "that there was no sufficient evidence of usury." If there had been any evidence tending to prove an usurious contract, it should properly have been left to the jury: but there was no such evidence, and surely in the absence of any evidence tending even to prove it, the Court cannot have erred in instructing the jury, "that there was not sufficient evidence of usury." So far from there being any evidence tending to prove usury, or from which the jury could have inferred an usurious agreement, the evidence set out in the record tends to a different conclusion.

The only evidence in the case is, the single bill, the account for the amount of which it was given, and a receipt on the back of the account by the obligee, for the bill in full of the account, of the same date with the bill; which receipt contains a stipulation, "that in case of error either way, should any be discovered, it shall be corrected." That receipt, if it tends to prove any thing, it is, that there was perfect fairness in the transaction; it seems to presuppose that there might possibly be mistakes in the charges, either of items of principal, or of interest, and provides for the correction of them, if they should be made to appear, and thus tends to show that there was not any usurious intention or agreement, rather than that there was. For can it be, that if there were known charges of interest exceeding the legal rates, intended and agreed upon between the parties, as a consideration for forbearance, and time given to the appellant for payment of the several sums of principal charged in the account, the obligee would at the same time, have armed the appellant with a stipulation for the correction of those very overcharges, the price of forbearance!

* The evidence goes to negative the allegation of usury, and no other inference can be drawn from it. **127**

The Court therefore, we think, did right in giving the instruction complained of. It was the least it could do, to tell the jury there was not sufficient evidence of usury, where there was no evidence at all.

Judgment affirmed.

SAMUEL HAMILTON vs. SAMUEL A. JONES.—June, 1831.

E. tenant for life, permitted A. to cut a ditch through her land, to supply his mill with water. Upon the death of E. a verbal agreement was made between the remainder-man and H. for the purchase of the ditch, and the amount of the purchase money was to be ascertained by certain arbitrators. An award being made, H. filed his bill for a performance of this agreement. The defendant's answer admitted the facts, but relied upon the Statute of Frauds as a bar—*Held*, there was no part performance, and the contract could not be enforced.

The ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is that to withhold relief, would be to suffer a party, seeking to shelter himself under the Statute of Frauds, himself to commit a fraud. (a)

APPEAL from the Equity side of Prince George's County Court. The bill which was filed on the 28th of December, 1825, stated, that some time in the year 1817, the complainant (the present appellant,) purchased a mill-seat and mill, on a water-course called "Piney

(a) Approved in *Hall vs. Hall*, 1 Gill, 390; *Semmes vs. Worthington*, 38 Md. 327; *Cole vs. Cole*, 41 Md. 304; *Small vs. Owings*, 1 Md. Ch. 369.

Branch," being part of a tract of land called the "Resurvey on part of Isaac's Park," containing two acres; that for the purpose of conveying water to his mill, with greater convenience and effect, he shortly after his aforesaid purchase, by the leave, and with the consent of a certain Elizabeth Jones, cut a ditch of about 100 or 120 yards in length, through a small angle, or corner of a tract of land called the "Wintersol's Range," at that time in the possession of the said Elizabeth Jones, who was tenant thereof for life, under the will of her deceased

128 husband, Richard S. Jones, and has * continually since, quietly used, and enjoyed the benefit of the said water-course, by means of the said ditch, until some time in October last, when a certain Samuel A. Jones, (the appellee,) to whom the land called "Wintersol's Range," had descended, upon the death of his mother the said Elizabeth Jones, which occurred some time in the preceding month of July, informed the complainant, that he conceived his land was injured by said ditch, and that some compensation must be made him therefor, which the complainant being perfectly willing to do, to any reasonable or just amount, assented; but they being themselves unable to agree upon what should be the amount of the compensation, it was agreed to leave the matter to the arbitration of two persons, one to be chosen by each party, with power to the arbitrators, in case of disagreement, to call in a third person as umpire; the defendant, the said Jones, promising upon the payment by the complainant to him, of the sum so to be ascertained to secure to the complainant and his heirs, the right to convey water to his mill in the manner aforesaid, by a legal, and valid instrument of writing. That the arbitrators not being able to agree upon the sum to be paid by the complainant, in pursuance of the authority given them for that purpose, called in an umpire, who determined, as complainant is informed, that ninety dollars was an adequate compensation for any damage, or injury which the defendant had, or might sustain by reason of said ditch, which sum, and ten dollars more, the complainant has already offered, and is still willing to pay the defendant, who refuses to receive the same, and threatens to destroy said ditch, and divert the water from complainant's mill, unless he will pay a much larger sum. Prayer for an injunction and a general relief, &c.

The County Court granted an injunction accordingly, until further order.

The answer of the defendant admitted the purchase by the complainant, of the mill seat, &c., as stated in his bill, and that he did with the leave, and permission of defendant's * mother Eliza

129 beth Jones, convey water to the same in the manner he has charged, through a part of a tract of land called "Wintersol's Range," in which the said Elizabeth had a life estate, under her husband's will; the defendant, under the same will, was entitled to a fee in remainder therein, after the death of the said Elizabeth. The defendant admitted, that upon the death of said Elizabeth,

which occurred some time in the fall of 1825, he took possession of said land, and supposing himself to be prejudiced by the said ditch, he informed complainant, that he must make him compensation, and unless he did so, he should be compelled to obstruct the passage of the water. He admitted the reference to arbitration as stated, and the calling in of the umpire, who, he has been informed and believes, declared, that the injury done defendant, was fully equal to \$120, but that he afterwards determined upon making an award upon principles, which defendant does not consider to be correct. The answer then asserts that the agreement set up in the bill, being in relation to an interest in land, and not being in writing, is void under the provisions of the Statute of Frauds, which is pleaded, and relied on as a defence to the relief prayed.

The cause was set down for hearing on bill, and answer, and the County Court at July Term, 1829, dissolved the injunction, and dismissed the bill with costs.

From this decree, the complainant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DOESEY, JJ.

A. C. Magruder, for the appellant, cited 1 *Madd. Ch. Pr.* 293; *Ib.* 301.

Johnson, for the appellee, cited *Hays vs. Richardson*, 1 *G. & J.* 382; *Heulins vs. Shippan*, 5 *Barn. and Cres.* 221; *Cooth vs. Jackson*, 6 *Ves. Jr.* 17; *Boardman vs. Mostyn*, 6 *Ves. Jr.* 470; 1 *Madd. Ch. Pr.* 301; *Wills vs. Stradling*, 3 *Ves.* 378; *Buckmaster vs. Harrop*, 13 *Ib.* 474; *Philips vs. Thompson*, 1 *Johns. Ch. C.* 149; *Jer. Eq.* 437.

* BUCHANAN, C. J., delivered the opinion of the Court. **131**
We can discover nothing in the record, to warrant a decree for the relief sought in the bill. The ditch, for the preservation of which, the aid of Chancery is invoked, was made by the permission of a tenant for life, then in possession, through the land of the defendant, the remainder-man, without (for anything that appears) his sanction or authority. The ditch, moreover, was exclusively for the convenience and benefit of the complainant, and the assent of the tenant for life to the making of it, appears to have been given without consideration. It was a mere naked license to the complainant, for his exclusive accommodation, voluntarily given by the tenant for life. The tenant for life, died in July, 1825, and in October the same year, the remainder-man who had then taken possession, informed the complainant, that his land was injured by the ditch, and that he must make him some compensation, or he would be obliged to obstruct it. There was no acquiescence therefore, by the defendant, in what had been done prejudicial to the complainant, or affording him any ground of complaint, or of a character to give him any stand-

ing in a Court of equity. At most, it was but an acquiescence for a month or two, in the enjoyment by the complainant, of an easement over the defendant's land, for the exclusive accommodation of the complainant, and to the prejudice of the defendant, and is wholly unlike the case of a remainder-man, who continues to receive the rent, and lies by, and with notice, suffers the lessee to rebuild, &c. to the improvement of the estate, and to the injury of the lessee, if evicted. The ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is, that to withhold relief, would be to suffer a party seeking * to shelter himself

132 under the Statute of Frauds, himself to commit fraud. But what fraud was there here, in merely suffering the complainant to enjoy an easement erected for his own benefit, on the land of the defendant, and to his prejudice, and that too, without any consideration? With respect to the alleged agreement by the defendant, to secure to the complainant and his heirs, the privilege of conveying the water to his mill through the ditch, on his paying to him as a consideration therefor, such sum as should be adjudged by arbitrators appointed by them, it is admitted by the answer; but it was a verbal agreement, and the Statute of Frauds is insisted upon, and nothing has been done to entitle the complainant to a decree for a specific performance.

The ditch was not made in pursuance, or upon the faith of that agreement, but was dug long before, by the permission of the tenant for life, without the sanction of the defendant, who had not then come into the possession of the land. It was not an improvement by which the value of the land was advanced, but directly the reverse, and the defendant has derived no benefit or advantage from it. The complainant has paid no money upon the agreement, nor been put to any costs or expense in consequence of, or upon the faith of it. There has been no part performance, nor any act done by him in part execution of it, from which he could suffer an injury, by the refusal of the defendant to execute it on his part. All he did, the making of the ditch, was done before the agreement, and not resulting from it. It was in reference to what had been already done, that the agreement was entered into, and what he had to do, to entitle himself to the beneficial enjoyment of it, was the payment of the sum determined on by the umpire as a sufficient consideration, which he might have declined doing, if he had seen fit; and the refusal by the defendant to accept it and fulfil his engagement, gives him no ground to stand upon, in the face of the Statute of Frauds.

* It is the mere case of a verbal agreement within the

133 tute of Frauds in relation to an interest in land, which the defendant refuses to fulfil, relying upon the statute; without any part performance by the complainant or other act done, for his claim to the interposition of Chancery to lean upon. The leaving of it to others to say, what would be a sufficient consideration for the privilege

of continuing to convey the water by means of the ditch, through the defendant's land, does not distinguish it from any other verbal agreement; and the circumstance alone, that the umpire determined on a sum, that he supposed would be a sufficient consideration, cannot have the effect to take it out of the statute; and notwithstanding the defendant in his answer, admits the agreement, yet as he insists on the statute, he is entitled to the benefit of it. *Decree affirmed.*

HUNGERFORD vs. BOURNE.—June, 1831.

Upon a bill against an alleged intruder for an account of the rents and profits of the complainant's estate, accruing during her minority, her guardian is not a competent witness to prove an agreement between himself and the defendant, that the defendant should keep the estate, and pay the rents to the complainant and her sister, who were jointly interested. It was the duty of the witness to have collected the rents, and accounted for them. He is therefore interested in sustaining the suit. (a)

The objection of the competency of a witness, by whose proof a mere interlocutory order, not the subject of an appeal, was obtained, is open to consideration in the Appellate Court, though more than nine months had elapsed, between the passage of the interlocutory order, and the time of taking the appeal from the final decree. (b)

APPEAL from the Court of Chancery. The bill in this case was filed by the appellee, Dorcas G. Bourne, against the appellant, William E. Hungerford, on the 21st of December, 1819.

* The following statement of the case and the proceedings in Chancery, is extracted from the opinion of the Judge, who pronounced the judgment of this Court. 134

The bill states, that in the year 1807, a certain Thomas Bourne died, seized and intestate of certain lands, one-half of which came by inheritance to the complainant; and that during her minority, the appellant took possession of it, and either rented it to others, or cultivated it himself, under an agreement with a certain James M. Taylor, her uncle, with whom she lived, to pay therefor per annum, 4,150 pounds of tobacco. The suit was instituted after she came of age; and with the bill, an account is exhibited of the alleged stipulated rent; the balance appearing on which, with interest on each year's rent, from the time it is supposed to have become due, is stated to be the quantity of tobacco claimed, with a prayer for an account of rents and profits, and for general relief.

(a) Distinguished in *Watts vs. Garrett*, post, m. p. 858. See *Drury vs. Conner*, 1 H. & G. 157.

(b) Cited in *Roberts vs. Salisbury*, post, m. p. 434; *Wilhelm vs. Caylor*, 82 Md. 162; *Wayman vs. Jones*, 4 Md. Ch. 512. See *Snowden vs. Dorsey*, 6 H. & J. 94.

The appellant in his answer, admits the title of the complainant to one-half of the land; but among other things denies, that he ever agreed with James M. Taylor, or any other person, to rent the land, or any part of it, at any price, or on any condition, or to pay the rent mentioned in the bill, or that he owes any part of the tobacco mentioned in the account exhibited with the bill, or that he ever took possession of, and cultivated the land himself, or rented it out to others, as charged in the bill; but admits, that on the death of Thomas Bourne, from whom the estate descended, he did enter upon the land as administrator, to finish the growing crop, and to receive from the tenants, the rents then due; and that he did at the particular request of his mother, who was entitled to one-half of the land, and of James M. Taylor, the relative and acting friend of the complainant, agree to rent out a parcel of the land for one year, with the express understanding that he was not in any way to be responsible for the rents, if the tenants should fail to pay. After testimony taken on both sides, among which was that of James M. Taylor,

135 which was objected to on the ground * of interest, the Chancellor being of opinion that it was competent, and upon the whole of the evidence, considering the appellant an intruder upon the estate of the complainant, on the 26th of July, 1827, decreed an account to be taken of the rents and profits, on the principle, that whoever enters upon the estate of an infant, is considered in equity, as entering as guardian to such infant, and may be made to account for the rents and profits.

The account reported by the auditor, was excepted to among other things, on the ground, that it was in part founded upon the testimony of James M. Taylor, who was alleged to be an incompetent witness. And on the 16th of February, 1829, the Chancellor overruled the exceptions to the report, and decreed that the appellant should pay to the complainant, the amount stated to be due, or bring the same into Court, to be paid to her. From which decree this appeal was made.

The cause came on to be argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Boyle, for the appellant, cited Act of 1829, ch. 24, sec. 8; 1798, ch. 101, sub-ch. 12, sec. 4, 5, and 8; *Drury vs. Conner*, 1 H. & G. 229; *Truss vs. Old*, 6 Randolph, 556; 2 Kent Com. 185, (5) 186, 187; 1 Rol. Abr. 121; 1 Com. Dig. Acc. E. 4, 189; *Dinwiddie vs. Bailey*, 6 Ves. 141; *Porter vs. Spencer*, 2 Johns. Ch. Cases. 169; *Smith vs. Marks*, 2 Randolph, 449; 2 Atk. 282; 3 Ib. 124; 1 Ves. Sr. 171; *Newburgh vs. Bickerstaff*, 1 Vernon, 295; *Cary vs. Bertie et al.* 2 Ib. 342; *Doe vs. Williams*, Cowp. 621; *Forrester vs. Pegon*, 1 M. and S. 9; *Harwood vs. Harwood*, 1806, per KILTY, Ch.; *Johnson vs. Berry*, per KILTY, Ch. 1810; *Winder et al. vs. Diffenderfer*, per BLAND, Ch. 1830; *Strike McDonald*, 2 H. & G. 240.

Magruder and Breuer, Jr. for the appellee, cited *McDonald vs. Strike*, 2 H. & G. 259; *Snowden vs. Dorsey*, 6 H. & J. 114; *Hagthorp vs. Hook*, 1 G. & J. 309; 2 *Madd. Ch. Pr.* 347, 348; 2 *Fonb. Eq.* 234; *Conner vs. Drury*, 1 H. & G. 230; *Gibbs vs. Clagget*, 2 G. & J. 14; *Underhill vs. Van Courtlandt*, 2 *Johns. Ch. C.* 369; *Ludlow vs. Simond*, 2 *Caine's Cases in Error*, 38, 40, 52; *Livingston vs. Livingston*, 4 *Johns. Ch. C.* 290; 1 *Eden's Rep.* 190.

Taney, (Attorney-General,) in reply, cited *Dorsey vs. Smith*, 6 H. & J. 262; *Thompson vs. McKim*, 6 H. & J. 302; *Hagthorp vs. Hook*, 1 G. & J. 307.

*BUCHANAN, C. J., delivered the opinion of the Court. After adverting to the statement of the case, before set forth the Judge proceeded: **139**

As the case is presented to us, we do not feel ourselves authorized to consider the appellant as an intruder upon the lands of the complainant, and to treat him as her guardian, and as such, answerable to her for the rents and profits of the estate. James M. Taylor swears that Thomas Bourne, from whom the estate descended, died in the spring or summer of the year 1807, that the complainant, whose business he transacted, lived at that time with him, that some time after the death of Thomas Bourne, either the succeeding fall, or spring, or summer, he is not certain which, the appellant proposed to keep the whole of the lands of the late Thomas Bourne, and to pay one-half of the rents, (to be ascertained by persons chosen for that purpose,) to the complainant, and her sister who was then living and entitled to a part of the land, (the appellant's mother being entitled to the other half) to which he, Taylor, who is stated in the bill to be the uncle of the complainant, and with whom she at the time lived, agreed.

If looking to this testimony, and treating Taylor as a competent witness, it should be held, that such a letting by an uncle and friend of the complainant entitled to be her guardian, and with whom she lived, and who was in the habit of transacting her business, was, if he had not then been appointed guardian, unauthorized, and that the entering upon, and holding the land by the appellant under such an agreement, constituted him an intruder, and subject to be made answerable in equity, for the rents and profits as a guardian; *yet seeing from other evidence in the cause, that Taylor was appointed guardian to the complainant, and filed his bond as such, in the Calvert County Orphans' Court on the 8th of August, 1808, may it not be inferred in the absence of anything to the contrary, that the agreement with the complainant, of which he speaks, was made after he was appointed guardian, and when he was clearly authorized to rent out the land? This would be perfectly consistent with that part of his testimony, in which he says that it was made in the fall, or spring, or summer, he is not certain which, next suc- **140**

ceeding the death of Thomas Bourne, which was in the spring or summer of 1807. For if it was made at any time during the month of August, 1808, after the 8th, it was in the summer, and within the words of his testimony. Besides, he may have been appointed guardian some time before he gave his bond, (for the time of his appointment does not appear in the record,) and it is more reasonable to suppose, that he made the agreement after he was appointed guardian, and when he was authorized to make it, than before, and when he was not authorized, there being nothing in his evidence confining the agreement to a prior time, or leading to a different conclusion. Or, if it was made before Taylor received the appointment of guardian, yet as he was appointed long before any rents became due, and as it appears that he, from that time, received a portion of the rents for each year, up to the year 1814, for which credits are given in the exhibit filed with the bill, and in the report of the auditor, it would seem to follow, that he accepted the appellant as his tenant in the capacity of guardian, and received the rents in that character; and that, from the time of his appointment, the relation in which the appellant stood to him, was that of his tenant, as the guardian of the complainant. In either case, the appellant was in by authority; in the first, from the time of the original agreement; and in the latter, from the time that Taylor was appointed guardian, when a new relation commenced, and when no rents and profits had been received, * and is not to be treated as an intruder, nor liable **141** to be called on as guardian, to account for the rents and profits. Nor answerable to the complainant on his contract with Taylor, to whom alone he is responsible; and if Taylor has violated his duty, or malconducted himself as guardian, her remedy is against him on his guardian's bond. But leaving this view of the subject, and looking to the other evidence in the record, it seems to us, that the testimony of Taylor cannot stand with that of several of the other witnesses, particularly that of James Wilson and Samuel Turner, with which it is wholly inconsistent; and taking the whole of the evidence together, we think the weight of testimony is against the complainant, and that the appellant did not take possession of the land, and either rent it out to others, or cultivate it himself, under an agreement with Taylor, to pay a stipulated rent as charged in the bill; nor at any time enter upon it, and occupy and enjoy it, or receive the rents and profits to his own use, so as to charge him as guardian, and that he had no other concern with it, than as the agent of James M. Taylor and his mother, for which we think he should not be made to account for the rents and profits. *Drury vs. Conner*, 1 H. & G. 220.

But if it was otherwise, and taking the whole of the evidence together, it would be sufficient to subject him to an account for the rents and profits, yet without the testimony of Taylor there is nothing to charge the appellant, and we think it was incompetent and

ought to have been rejected. He was the guardian of the complainant. It was his duty to collect the rents and account for them, and if he received and misapplied them, or they were lost, by any culpable negligence or inattention to his duty, he is answerable on his bond to the complainant, and is therefore interested in sustaining this suit, and thereby exonerating himself from liability. But it is said that this objection comes too late, and that the appellant, to avail himself of it, should have appealed from the interlocutory decree of the 26th of July, 1827, (by which the rights of the parties are supposed to *have been settled,) within nine months from the time it was passed, the time prescribed by the Act of 1785, ch. 72, sec. 27; whereas this appeal, which is from the final decree of the Chancellor, was taken on the 3d of June, 1829, almost two years after the date of the interlocutory decree. But to this we cannot yield our assent; the rights of the parties were not finally adjudicated by the interlocutory decree of the 26th July, 1827. It is true the Chancellor does say, that he "considers all the testimony in the case competent, and so far credible when taken altogether, as to entitle the plaintiff to recover." But that is not a decree finally settling any thing in controversy between the parties; but an expression only of the opinion of the Chancellor, upon which the decree for an account was founded. And the account when taken, might have been rejected by the Chancellor on further proof on more full consideration. The decree, therefore, directing an account to be taken, was a mere interlocutory order, from which an appeal could not properly have been taken. *Snowden and others vs. Dorsey and others*, 6 H. & J. 114—and *Hagthorp and Wife and others vs. Hook's Adm'rs*, 1 G. & J. 270, are conclusive on this point, and as an appeal would not lie from the decree for an account, the whole case is open upon the appeal from the final decree.

Decree reversed, and bill dismissed with costs in both Courts.

THOMAS' Lessee vs. GODFREY *et al.*—June, 1831.

The construction of a grant is for the Court, and not a matter proper to be submitted to a jury, except in a case of latent ambiguity. (a)

It is a well established rule of construction, that calls, whether to artificial or natural objects, are to be preferred to courses and distances; therefore, when a tract of land is described by courses and distances, and calls, the calls are to be gratified in the construction of the grant, if they can be established, and the courses and distances disregarded, if they do not correspond with the calls. (b)

(a) See *Carroll vs. Norwood*, 5 H. & J. 121; *Hammond vs. Ridgely*, *Ibid.* 199, note, to same effect.

(b) See *Wilson vs. Inloes*, 6 Gill, 121; *Proprietary vs. Jennings*, 1 H. & McH. 62, note.

143 * Where there are two inconsistent expressions or calls, both of which cannot be gratified, but either of which standing alone would be imperative, that which appears to be the most certain, and most consonant to the intention apparent upon the face of the patent, should in the construction of it, be preferred, for the same reason that calls are preferred to courses and distances, because more certain. Or if there is any thing on the face of the patent to explain or qualify one of them, so as to show, that the other was intended to be the governing or imperative call, it should be so treated.

So where the patent for a tract of land described it as "beginning at a bound hickory on the side of a hill, on the S. side of the main falls of Patapsco, respecting to the W. Chew's Resolution Manor, and running with the said manor, S. &c. 200 p. to a bound hickory, then N. W. 340 p. to a bound white oak, then N. &c. 250 p. to the main falls of———, with the main falls by a direct line to the first bound tree." Held, that according to the construction of the patent, the first line thereof should be run from the first to the second bounded hickory, and that the words "running with the said manor," did not constitute a peremptory call, but like the course and distance, were directory only to the principal call the tree. And that as to the home line, it should be run from the termination of the third line, direct to the beginning tree, the words "with the main falls" being qualified by the subsequent terms "direct line." (c)

APPEAL from Anne Arundel County Court. Ejectment for a tract of land called "the Valley of Owen," commenced by Allen Thomas, the lessor of the plaintiff, against the appellees, Samuel Godfrey and others, on the 29th March, 1826. The defendants pleaded not guilty, and took defence on warrant. A warrant of resurvey issued and plots were returned. Defence was taken for the whole of the tract of land called "Stout," as located by them on the plots; for the tract called "West Ilchester," as located by them upon the plots; for the tract called "Caleb's Vineyard," as located by them; for the tract called "Littleworth," as also located by them; for all that part of the tract called "Prestedges' Folly," (as also located by them) which lies to the west of the third line of the Valley of Owen, as that line is located by them, in their second location of the Valley of Owen; and for all the other land which lies south and west of, and upon said location of said third line, and which is included in plaintiffs' fourth location of * the Valley of Owen, and which by a written

144 agreement between plaintiffs and defendants, on file in the

(c) Relied on in *Smallwood vs. Hatton*, 4 Md. Ch. 100, where the Chancellor thought it manifest from the reasoning of the Court in the case in the text, that the survey would have been closed by pursuing the meanders of the stream but for the introduction of the words, "by a direct line," which showed that the meanders of the stream were not intended; and he held that where the home line of a tract was described to run "thence down said branch to the beginning," that this line must be run with the meanders of the branch and not in a straight line to the beginning.

cause, is admitted to be covered by the location of the tracts called "Timber Neck," "Jefferson," and "Littleworth."

1. At the trial the plaintiff read in evidence to the jury subject to all exceptions, the certificate of the "Valley of Owen," issued on a warrant of resurvey, returned by Richard Owen, on the 7th of September, 1703, describing the said land as "beginning at a bounded hickory on the side of a hill on the south side of the main falls of Patapsco, and respective to the west Chew's Resolution Manor, and running with the said manor south 53 degrees west, 200 perches to a bounded hickory, then north-west 340 perches, to a bounded white oak, then north 53 degrees east, 250 perches, to the main falls, thence with the main falls by a direct line to the first bounded tree, containing, &c." And also with like exception, read in evidence the patent for the said tract, granted to Richard Owen, on the 20th May, 1705. The description of said tract in the patent is as follows: "Beginning at a bound hickory, on the side of a hill, on the south side of the main falls of Patapsco, respecting to the west Chew's Resolution Manor, and running with the said manor, south 53 degrees west, 200 perches to a bound hickory, then north-west 340 perches to a bound white oak, then north 53 degrees east, 250 perches to the main falls of, with the main falls by a direct line to the first bound tree, containing, &c."

And the plaintiff offered to prove by other title papers, a title in the lessor of the plaintiff to the said tract of land, derived from the said Richard Owen, the patentee; and gave in evidence the certificate of a tract of land called "Chew's Resolution Manor," surveyed for Samuel Chew, the 15th April, 1698. The defendants then objected, that the certificate, and patent of "The Valley of Owen" herein-before mentioned, were inadmissible in evidence, because there was no location upon the plots of said tract, by the plaintiff, corresponding with the description, and calls, in * said certificate, and patent; which objection the Court sustained, and instructed **145** the jury that said certificate and patent were not admissible, the same not having been located to bind on a tract of land called "Chew's Resolution Manor," as required by the peremptory call in said certificate and patent. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

A. C. Magruder, for the appellant, contended, 1. That there is no peremptory call to the tract of land called "Chew's Resolution Manor," there being no particular point or line, or side of said tract to which the first line is to go. 2. That the words in the patent, "respecting to the west Chew's Resolution Manor," and in the certificate, "respective to the west Chew's Resolution Manor," are unintelligible, and must be rejected; and that the true location of the

line is to commence at the "bound hickory," spoken of, as the beginning, and run thence (without regard either to the expression "respective to the west," &c. or to the course and distance,) to the second bound hickory mentioned in the grant. 3. That according to the true construction of the grant, the line which commences at the bounded white oak (third boundary) is to run thence the course mentioned in the grant, with an allowance for variation to the main falls, and that the closing line, is to run with, or along, and not as the defendant's counsel contended, from the main falls. He referred to *Helm vs. Howard*, 2 H. & McH. 82; *Calhoun vs. Hall*, 1b. 116; *Pennington vs. Bordley*, 4 H. & J. 450; *Rogers vs. Moore*, 7 Ib. 141; *Mundell vs. Clerklee*, 3 H. & J. 469; *Hammond vs. Ridgely*, 5 H. & J. 245, 256, 274; *Davis vs. Battey*, 1 H. & J. 264; Act of 1830, ch. 186.

* *R. Johnson*, for the appellee. 1. The question is as to the
146 true location of the Valley of Owen, omitting the first line. A patent not legally located cannot be read in evidence. *Hughes vs. Howard*, 3 H. & J. 9; *Pennington vs. Bordley*, 4 Ib. 450, 471; *Mundell vs. Clerklee*, 3 Ib. 469. The Court is the tribunal to determine the true construction of the grant. *Hammond vs. Ridgely*, 5 H. & J. 245. The expressions in the patent of the Valley of Owen, are such as to require it to bind on Chew's Resolution Manor. When a junior grant calls for the line of an elder, the call is peremptory, and it is not material whether a particular line is called for or not. *Carroll vs. Norwood*, 5 H. & J. 163. In addition to the call for the manor, there is a call for a hickory, as the termination of the first line, and if both are peremptory, and incapable of being gratified, the grant is void. *Rogers vs. Moore*, 7 H. & J. 141. If both calls can be gratified, they should be. When a tree and the line of a tract of land are called for, you are first to go to the nearest, and then if the distance is exhausted before you reach the other call, you must elongate it, or run a new line, if it be necessary to do so, to reach the most remote call. The reasoning of the Court in *Howard vs. Helms*, 2 H. & McH. 80, cited on the other side, has been decided to be erroneous. *Pennington vs. Bordley*, 4 H. & J. 458. 2. If in running the home line of the Valley of Owen, you reject the word direct, used in the patent, seventeen or eighteen new lines must be added to close the survey. If the expressions "with the falls," are gratified, you cannot get to the beginning tree, because that tree does not stand on the falls; and it follows therefore, that if the expressions, "with Chew's Resolution Manor," are to be rejected, because by so running you cannot get to the bounded tree called for, you must for the same reason, reject the words "with the falls," because if you run with the falls, you can never get to the beginning tree. He insisted that the last line should be located, so as to run as near the falls as practicable, consistently with its being straight. *Pumphrey vs. Ashpaw*, 4 H. & J. 368. The Act of 1830, ch. 186, he said was prospective, and there-

fore did not apply to the present case, which was pending at the time of its passage.

Taney, (Attorney-General,) in reply, cited *Rogers vs. Raborg*, 2 G. & J. 63, 64; *Davis vs. Batty*, 1 H. & J. 268, 269; *Connelly vs. Bowie*, 6 H. & J. 143; *Helm vs. Howard*, 2 H. & McH. 82; *Shield vs. Miller*, 4 H. & J. 1; *Connelly vs. Bowie*, 6 Ib. 143; *Pennington vs. Bordley*, 4 H. & J. 457, 458; *Hughes vs. Howard*, 3 Ib. 9, 13; *Hammond vs. Ridgely*, 5 H. & J. 256, 274, 275.

* BUCHANAN, C. J., delivered the opinion of the Court. The action was brought for a tract of land called "The Valley of Owen," and the question is, how that land should be located, which depends upon the construction of the patent. That the construction of a grant falls peculiarly within the province of the Court, and is not a matter proper to be submitted to a jury, except in a case of latent ambiguity, is a principle too long and too well established, now to be disputed in this Court. What then is the construction proper to be given to the patent for "The Valley of Owen?" The expressions are, "beginning at a bound hickory on the side of a hill, on the south side of the main falls of Patapsco, respecting to the west Chew's Resolution Manor, and running with the said Manor, south 53 degrees west, 200 perches to a bound hickory; then north-west, 340 perches, to a bound white oak; then north 53 degrees east, 250 perches to the main falls of, with the main falls, by a direct line to the first bound tree." It is a well established and known rule of construction in the Courts of this State, that calls, whether to artificial or natural objects, are to be preferred to courses and distances; therefore, when a tract of land is described by courses and distances, and calls, the calls are to be gratified in the construction of the grant, if they can be established, and the courses and distances disregarded, if they do not correspond with the calls. The better reason for which, is believed to be the greater certainty afforded by calls, than by courses and distances. In this case it is contended, that the expressions, "and running with the said manor," constitute a peremptory call to the tract of land called "Chew's Resolution Manor," and that "The Valley of Owen" must be located to bind on that tract, and it was so decided by the Court below. But we think they were not used in that sense; and that being associated with a course and distance expressed in the patent, and a further call to a tree, a fixed and natural object, they are not to be interpreted as importing an imperative, or peremptory call, to run * with, and bind upon "Chew's Resolution Manor," but that the tree called for, was intended as the principal object, the boundary to regulate the location of that line; and the reference to "Chew's Resolution Manor," and the course and distance expressed, directory only to that object, and introduced but as a means of arriving at it. The expressions used are, "and running with the said manor south 53 degrees west,

200 perches to a bound hickory." It is not the case of a course and distance line of one tract of land, calling to, or to run with, or bind upon, a water-course, or another tract of land, or a line of another tract, with no ulterior object called for, and looking only to the water-course, or other tract, or line, as the definite object to be reached or run with, and to which the course and distance expressed, if not corresponding with it, is made to yield. But here, there is a fixed ulterior object, a tree imperatively called for and designated as the boundary intended to be run to; which intention, apparent upon the face of the patent, explaining and qualifying the expressions "running with the said manor," and showing them to have been used, not as binding expressions, but as directory only to the tree called for, must be gratified, by running the first line from the beginning tree, to the tree called for, (if it can be proved,) in the manner directed in the patent, if that can be done; but if it cannot be done, either by running the course and distance expressed, or by a running binding upon the manor, then, the direction failing, a course must be shaped from the beginning directly to the tree called for, without regard to either the manor, or the course and distance expressed; the true position of that tree to be determined by a jury, whose province it always is, to find facts, and to ascertain the true position of the object called for, from the evidence submitted to them; but not to determine the question, whether or in what manner a call shall be gratified, or any question of construction arising upon the face of the patent. That belongs exclusively to the Court, whose peculiar pro-

151 vince it is to expound * patents, according to the intention to be collected from the terms or expressions used, and not on facts or matter aliunde. Where a tract of land, or a line of a tract of land, is peremptorily called for as the governing object, it controls the course and distance for the greater certainty. But where such a line is referred to, with a view to another object peremptorily called for, that object is the imperative call, and not the line referred to; and must be gratified, whether its position corresponds with the line referred to or not. As where there is a call to a tree, described as standing in, or at the end of a specified line of another tract of land, then the reference to the line, is not considered as a peremptory call, controlling the call to the tree; but the call to the tree is the imperative call, and must be gratified if it can be established, no matter where it stands, without regard to the line; which is to be taken, as intended only as a *designatio loci*, where the tree was supposed to stand. We differ therefore with the Court below, in the opinion, that the expressions, "running with the said manor" as used in the patent for the Valley of Owen, constitute a peremptory call, and that the first line of that, must be located to bind on the land called Chew's Resolution Manor.

But as the patent was rejected on the ground, that there was no location of it upon the plots, returned in the cause, corresponding

with the description and calls expressed, it is necessary to inquire, how the home or given line should be located, which is not altogether free from difficulty. The third line has a call to the main falls, and from that point the description is, "with the main falls by a direct line to the first bound tree." And the question is, whether that line should be run with the meanders of the stream, or directly from the termination of the third line on the falls, to the beginning tree? Where there are two inconsistent expressions or calls, both of which cannot be gratified, but either of which standing alone, would be imperative, that which appears to be the most certain and most consonant to the intention apparent upon the face of the patent, should * in the construction of it, be preferred, for the same reason 152 that calls are preferred to courses and distances, because more certain. Or, if there is any thing on the face of the patent to explain or qualify one of them, so as to show that the other was intended to be the governing or imperative call, it should be so treated. Here the expressions, "with the main falls," and "by a direct line," to the first bound tree, are inconsistent, and cannot both be gratified, if the stream is not straight, or does not run to the beginning tree; and it seems to us, that the expressions "with the main falls," are so qualified by the other expressions, "by a direct line," as to show, that the latter were intended as the governing or controlling expressions, and that the given line should be run directly from the place of departure to the beginning tree, the object imperatively called for, and that by the words, "with the main falls," the general course of the stream was meant, the meanders of which could not be pursued by a single direct line. If it was intended that the survey should be closed, by pursuing the meanders of the stream from the end of the third line to the beginning tree, the expressions would properly and most probably have been "with the main falls to the first bound tree," and not as they are, "by a direct line" to the first bound tree. Which addition of the words, "by a direct line," shows that the meanders of the stream were not intended, which could not be by a direct line, but that it was intended to close the survey by a single line drawn from one point to the other. Besides, the beginning tree is not described as standing at or by the stream, but on the side of a hill; the surveyor, therefore, at the time of taking up the land, must have known that the survey could not be closed by pursuing the meanders of the stream, which did not run to the tree called for, but that it would be necessary to shape an arbitrary course from the stream, in order to get to the tree, which would be entirely inconsistent with a direct line from point to point; and assist in showing that the words, "with the main falls," were not intended to be used as binding expressions, * but are qualified and controlled by 153 the words next following, "by a direct line." We think, therefore, that "The Valley of Owen," must be located by running the given or home line, directly from the termination of the third line to

the beginning tree, wherever they may be found to be; and not being so located by the plaintiff on the plots returned in the cause, but by running it with the meanders of the main falls of Patapsco, and by an arbitrary line drawn from that stream to the beginning tree, in order to close the survey, and without which, it could not be done, that the patent was not evidence to support his location so made.

*Judgment affirmed, and procedendo awarded,
Under the Act of 1830, ch. 186.*

HOYE *vs.* BREWER AND TROUP.—June, 1831.

According to the principles of equitable jurisprudence, the personal estate is the natural fund for the payment of debts and legacies, and generally speaking, is first to be exhausted, before resort can be had to real property.

Where a testator charges both his real and personal estate with the payment of debts and legacies, and a purchaser of the real estate desires to have his bonds given for the purchase money, applied to release his purchase from the charge in the will, it should regularly appear upon the face of his bill, that the whole personalty had been applied towards the payment of debts and legacies. That must appear before a Court of equity could decree the land to be liable for such purpose, and ought to be expressly averred.

That averment is so essential, that where it ought to have been made, and was not, although it was stated in the decree passed by the County Court, that the solicitors of the defendants admitted the whole of the personal estate to have been applied towards the payment of debts and legacies, yet as a party must always obtain redress according to his allegations and proofs, the Appellate Court reversed the decree containing that statement, but without prejudice.

APPEAL from the equity side of Washington County Court. The bill which was filed in this case by the appellees, John Brewer and Adam Troup, against the appellant, * John Hoyer, Jacob **154** Fiery, and others, on the 23d day of January, 1829, stated that Henry Fiery died seized of a large and valuable real estate, which he devised to his three sons, Henry, Joseph and Jacob, to the last of whom he devised a tract of land lying in Franklin County, Pennsylvania. That he bequeathed to his three daughters, Mary, Catharine, and Susanna, the sum of £3,000 each, to be paid to them as they respectively attained the age of eighteen years, by his said three sons, whom he appointed his executors; that he charged his real and personal estate with the payment of his debts and legacies. The bill further states, that John Brewer, one of the complainants, in the year 1819, entered into articles of agreement with Jacob Fiery, one of the devisees, for the purchase of the tract of land devised to him, lying in Franklin County aforesaid, and paid a considerable part of the purchase money, and gave his bonds, with Adam Troup,

the other complainant, as his security for the payment of the balance of the purchase money. That the said Jacob Fiery, on or about the 17th of November, 1820, assigned the said bonds to a certain John Hoyer and Ann Hoyer, who is since dead, having made the said John Hoyer her executor. The bill further states, that the complainant Brewer, had paid all the said bonds to the said John Hoyer, except the two last, upon which suits have been instituted in Washington County Court, by Hoyer against him the said Brewer. The bill further states that the legacies bequeathed to two of the daughters have been paid; that the one bequeathed to his daughter Susanna had not been paid, and still remained a charge upon the land bought by him of said Jacob Fiery, in virtue of the provisions of his father's will. The said complainant, John Brewer, further states, that he has reason to believe that the bonds remaining due to said Hoyer, upon which suits had been brought, would not be more than sufficient to extinguish the liability of the land purchased by him to satisfy the legacy to Susanna, charged upon it. The bill further states, that at the time Brewer executed his bonds to Fiery, he did not know of the incumbrances upon * the land bought by him, nor did he know of the same at the time of the assignment of his 155 bonds to Hoyer, or at the time he paid the several sums of money to him; that since the discovery of the said incumbrance, he has paid nothing, by reason of said assignments; that at the time he executed his bonds, he did not know that his bonds were to be assigned to Hoyer, or to any other person. The object of the bill is then stated to be, to ascertain, whether the balance of the purchase money due by him ought to be applied in the first instance to satisfy the legacy due to the said Susanna, and if it should be so determined, that the bonds should be delivered up to Henry Angle, with whom the said Susanna had intermarried, and he be authorized to receive the money due thereon; from said Brewer, and give acquittances therefor. The bill then prays for an injunction to stay proceedings on said suits, and for general relief. The deed from Fiery to Brewer bears date on the 20th November, 1820.

The answer of John Hoyer to the said bill states, that in or about the year 1820, Jacob Fiery, one of the defendants, was indebted to him and Ann Hoyer, since dead, in a considerable sum of money, and that he being pressed for payment at that time, by him the said Hoyer, offered to assign to him and the said Ann Hoyer, certain bonds which he was about to obtain from the complainant, John Brewer; that he agreed to receive the bonds as collateral security for the said debt, and on a day appointed for that purpose, accompanied the said Jacob Fiery to the house of the complainant, in order to take an assignment of the said bonds, as soon as they were executed. That Brewer expressed some apprehension, that if he executed the bonds, and they were assigned to him, Hoyer, that he would press him for the payment of the money; that he assured Brewer he need not be

under any uneasiness on that score; that all he wanted was to have his debt secured, and that he would not urge the payment for a considerable time, provided he would pay the interest punctually; that on receiving these assurances, Brewer appeared to be satisfied, and

that the bonds were *executed by Brewer, and assigned by **156** Fiery to him, Hoyer. That in consideration of receiving said bonds, he stopped further proceedings against the said Jacob Fiery, and relied upon the said bonds to discharge the said debt, due from the said Jacob to him and the said Ann, &c.

In the will of Henry Fiery exhibited with the bill, there are the following clauses:

"To each of my three daughters, Mary, Catharine, and Susanna, I give a bed, and the sum of £3,000, to be paid by my executors hereinafter named, as the said girls may respectively attain the age of eighteen years." "I charge the lands devised to my three sons, (Henry, Joseph, and Jacob,) and all the personal property whereof I die possessed, which is not herein before specifically devised, with the payment of my just debts, legacies, and devises, herein before given and made."

The deed from Jacob Fiery to complainant, Brewer, also exhibited with the bill, bearing date November 20th, 1820, recites, "that whereas Henry Fiery did, by his last will and testament bequeath to his son Jacob Fiery," a certain tract of land, &c.

There were other defendants to the bill, but their answers are considered immaterial.

The case was referred to the auditor, for the purpose of ascertaining the amount due upon the legacy to Susanna.

Afterwards, the County Court [TH. BUCHANAN, A. J.] passed the following decree: The above cause coming on to be heard, and being submitted for final decision by the solicitors of the parties, and it appearing from the report of the auditor, made pursuant to the order of this Court, that there is still due to Susanna, one of the daughters and legatees of Henry Fiery, deceased, the sum of \$12,257, with interest upon \$8,000, part thereof from the 15th day of June, 1829; and it appearing further from said report, and proceedings in this cause, and the same being admitted by the solicitors of the defendants in Court, that the whole of the personal estate of the

157 said testator has been applied towards *the payments of the debts and legacies, and that the amount still due by Jacob Fiery, as one of the executors and devisees of the said testator, to the said Susanna, exceeds in amount the balance unpaid on the bonds of the said John Brewer to the said Jacob Fiery, and by him assigned to the said John Hoyer. It is thereupon this third day of June, 1829, adjudged, &c. that the injunction heretofore granted, be made perpetual.

From this decree the defendant Hoyer appealed to the Court of Appeals.

The cause was argued before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Anderson and Taney, (Attorney-General,) for the appellants.
Price and Yost, for the appellees.

STEPHEN, J. delivered the opinion of the Court. After advert-
ing to the facts alleged in the pleadings, he said, according to the prin-
ciples of equitable jurisprudence, the personal estate is the natural
fund for the payment of debts and legacies, and generally speaking,
is first to be exhausted before resort can be had to the real property.
In the present case, the testator charges both his real and personal
estate with the payment of his debts and legacies, and it should reg-
ularly appear upon the face of the pleadings, that the whole of the
personalty had been applied towards their extinguishment, before a
Court of equity could consistently, with established principles, decree
the land to be liable for that purpose. The bill in this case does not
expressly charge a deficiency of the personal fund; on the contrary,
it only alleges that fact by a vague and doubtful implication, where
it states that he has "reason to believe that the bonds in suit as
aforesaid will not more than cover the liability of the said land."
An averment so essential to the complainant's merits ought to be
expressly made, and not left to argumentative inference or construc-
tion. If the personal estate * was adequate to the payment
of the legacies, no liability could ever attach upon the land 158
purchased by the complainant, and of course there would be no
ground for his application to a Court of equity for relief; although
therefore, it was admitted, as stated in the decree, that the personal
assets were exhausted, yet, as in equity, a party must always obtain
redress *secundum allegata et probata*, without deciding upon the other
points raised during the discussion; we think the decree of the
Court below must be reversed, but without prejudice.

Decree reversed.

HYSINGER vs. T. & P. BALTZELL.—June, 1831.

By the Act of November, 1765, ch. 12, it is declared, that if a person who is
liable to an action, shall be out of the Province at the time the cause of
action hath accrued, he shall have no benefit or advantage from the Act
of 1715, ch. 28, (the Act of Limitations) provided, the person who has
such cause of action shall prosecute the same, after the presence, in this
Province, of the person liable thereto, within the time or times limited,
in and by the said Act of 1715. *Held*, upon the construction of this Act:

1. That the Acts of 1715, ch. 28, and 1765, ch. 12, are to be taken together,
and to receive a construction to carry into effect the plain and obvious
intention of the Legislature, that limitations should not attach against a

creditor, where the debtor was absent from the State, at the time the cause of action accrued. (a)

2. That if at any time after the cause of action accrued, the debtor, by his presence in the State, afforded the creditor an opportunity to prosecute his writ with effect, he should institute his action within the time required by the Act of 1715, or his claim would be barred by limitation. (b)
3. To bring a case within the Act of 1765, the presence of the debtor within the State, must be such as to enable the creditor to avail himself of it; a secret, concealed, clandestine presence for any length of time, of which, the creditor could not take advantage, would not be sufficient. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, to arrest the debtor.

Where a cause of action accrued in October, 1822, when the defendant was a resident of another State, and it appeared, upon a case stated, that the

(a) See Rev. Code, Art. 69, secs. 4 and 5. In *Maurice vs. Worden*, 52 Md. 283, in an action of assumpsit to which limitations was pleaded, the plaintiff replied that after the contracting of the debt, &c. and within three years after, the defendant absented himself from the State, whereby the plaintiff was at an uncertainty in finding out said defendant or his effects; nor did defendant have effects sufficient and known for the payment of his debts in the hands of any person, &c.; and the action was brought within three years after defendant's return to this State; nor had the defendant been in this State for three years in all, after the cause of action accrued to the plaintiff, at the time the suit was commenced. It was held that the first part of this replication was not a sufficient answer to the plea, and that the plaintiff could not, as attempted in the last part of the above replication, avoid the Act of Limitations by going into a calculation of time, showing that the defendant had not been within the State *precisely three years in all*, from the time the cause of action arose, to the time of suit brought.

The Court said: "The other replication of the appellant rests upon the 4th sec. of Art. 57, of the Code. The provisions of this section, codified from the old Act of 1715, c. 23, secs. 4 and 5, are peculiar to this State. We know of no case in practice where its provisions have been relied on to avoid the running of the statute. The profession does not seem to have relied on its rather ambiguous terms, and it is now, for the first time, brought before the consideration of this Court. This section must be construed with reference to the time and circumstances under which the law from which it is codified was passed, and in subordination to well established rules in reference to Limitations. The recital by way of preamble to the section in the original law shows that it was passed to reach the cases of persons who absented themselves from the Province, or wandered from county to county, for the purpose of availing themselves of the time limited in the law. After the debt was contracted, or the cause of action arose, they so moved from place to place, or left the Province, as to conceal from the creditor their place of abode; and no reasonable time was allowed him in which to bring his action. It was to remedy this evil that secs. 4 and 5 of the Act of 1715, were adopted as a part of the law of limitations in the Province, and in that sense they must now be understood, as they are codified in the 4th sec. of Art. 57, of the Code."

(b) Relied on in *Maurice vs. Worden*, 52 Md. 295; *White vs. White*, 1 Md. Ch. 57.

defendant was in Baltimore, where the plaintiff resided, in April, 1823, "purchased other goods from the plaintiff, and remained there for two days," it was *Held*, that limitations did not then attach, because it did not * appear at what time during those two days, the defendant made his purchase: nor whether the plaintiff had an opportunity to sue out a writ against him with effect. (c) **159**

Upon a case stated, the Court can supply no fact by implication. (d)

APPEAL from Washington County Court.—Assumpsit by the appellees, Thomas and Philip Baltzell, against the appellant, Christian Hysinger, instituted November 13th, 1826, for goods, wares and merchandise, sold and delivered by the appellees, to the appellant and John Strealey. *Non assumpsit* and limitations were pleaded. A verdict was taken by consent, for the plaintiffs, subject to the opinion of the Court, upon the following statement of facts—viz:

"That at the time when the goods in the declaration mentioned were sold and delivered, the plaintiffs were, and still are merchants, residing in Baltimore, and that the defendant resided in Chambersburg, in the State of Pennsylvania, from that time until November, 1824, when he removed to Maryland. It is further admitted, that the said goods were sold and delivered to the defendant, on the 13th of April, 1822, upon a credit of six months. That in the month of December, 1822, the defendant made a payment, in Baltimore, to the plaintiffs, upon another claim, which they had against him. In April, 1823, the defendant purchased other goods from the plaintiffs in Baltimore, for which he paid the cash, and remained there two days. That, at that time, the defendant admitted the money, now in question, to be due, and promised to pay it. That the defendant was again in Baltimore, in the summer of 1823, and his being there was known to the plaintiffs. If the Court shall be of opinion, that the defendant can, under these circumstances, avail himself of the Statute of Limitations, then judgment for the defendant, otherwise for the plaintiffs. Either party to be at liberty to appeal or sue out a writ of error."

The County Court, upon the preceding statement, gave judgment on the verdict for the plaintiffs, and the defendant brought the present appeal.

The cause was argued before MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

* *Price*, for the appellants, contended, 1, There being no replication, the issues are formed, by what is affirmed by the **160**

(c) Cited in *Worthington vs. Tormey*, 34 Md. 197.

(d) Approved in *Van Brunt vs. Pike*, 4 Gill, 274; *Vansant vs. Roberts*, 3 Md. 127; *Keller vs. State*, 12 Md. 328; *McColgan vs. Hopkins*, 17 Md. 402. See *Mahoney vs. Ashton*, 4 H. & McH. 140; *Reeside vs. Fischer*, 2 H. & G. 285.

declaration, and denied by the pleas; and that the facts agreed, can be considered only, with a view to the truth or falsehood of the issues, thus formed. 2. Had there been a replication in proper form, stating that the defendant, at the time the cause of action accrued, was absent out of the State, still the facts agreed, were sufficient to entitle the appellant to the judgment of the Court below. He referred to the Act of 1765, ch. 12, sec. 2, 3.

Mayer, for the appellees. 1. The case stated is a part of the record, and is considered as constituting a part of the pleadings. The statement of facts in this case, shows the ground relied upon to avoid the bar of the statute, and is equivalent to a special replication. 2. The mere circumstance of the presence of the defendant, at the time the cause of action accrued, is not sufficient to entitle him to the benefit of the statute, unless the plaintiff had a reasonable opportunity of suing him with effect, and the case stated should exhibit the fact. He referred to *Fowler vs. Hunt*, 10 Johns. 465; *White vs. Bailey*, 3 Mass. 271; Acts of 1715, ch. 23, sec. 4, and 1765, ch. 12, sec. 2, 3; *Oliver vs. Gray*, 1 H. & G. 216.

MARTIN, J. delivered the opinion of the Court. This was an action of assumpsit instituted to recover the value of certain goods, wares and merchandises, sold and delivered by the plaintiffs; to the defendant and a certain John Strealey. To the declaration filed in this cause, the defendant pleaded *non assumpsit*, and *non assumpsit infra tres annos*. The record contains no replication to these pleas, although the jury were sworn to try the issues between the parties. This omission, we are induced to believe, proceeded from an agreement, that a mere formal verdict should be taken by consent, subject to the opinion of * the Court upon a case stated. Under the
161 impression, that this agreement was intended by the parties, as a waiver of all irregularity in the pleadings, and that the Court should decide upon the law, presented by the case stated, we proceed to review their opinion.

It is admitted, the goods, wares and merchandises were sold and delivered on the 13th of April, 1822, upon a credit of six months; the debt was therefore demandable on the 13th of October, 1822, and if no impediment had interposed, limitations would attach at that time; this however, was prevented by the absence of the defendant from the State of Maryland. The presence of the defendant in the State, in December, 1822, would not bar the plaintiffs' action, because the defendant, in 1823, admitted the debt and promised to pay it, which acknowledgment revived the original cause of action. In April, 1823, the defendant was in Baltimore, remained there two days, was with the plaintiffs, and had dealings with them. He was also in Baltimore in the summer of 1823, and the plaintiffs knew it. If then, limitations attached in April, 1823, or afterwards in the summer of that year, the action would be barred, because more than

three years had elapsed, from either of those periods, before the institution of this suit, which was on the 13th of November, 1826.

By the Act of 1715, ch. 123, it is enacted, (among other things) that all actions on the case upon simple contract, book debt or account, shall be commenced within three years ensuing the cause of such action, and not after; and by a supplementary Act in November, 1765, ch. 12, it is declared, that if a person who is liable to an action, shall be absent out of the Province at the time the cause of action hath accrued, he shall have no benefit or advantage from the Act of 1715, provided, the person who has such cause of action, shall prosecute the same, after the presence in this Province, of the person liable thereto, within the time or times limited in and by the said Act of 1715. These Acts are to be taken together, and to receive a construction to * carry into effect the plain and obvious intentions of the Legislature, that limitations should not attach **162** against a creditor, where the debtor was absent from the State at the time the cause of action accrued, because no beneficial result could be expected from the suing out a writ, when the debtor could not be arrested. But this privilege should cease, when the cause upon which it was founded, was removed. If, therefore, the debtor, at any time after the cause of action accrued, by his presence in the State, afforded the creditor an opportunity to prosecute his writ with effect, he should institute an action within the time required by the Act of 1715, or his claim would be barred by limitation. To bring the case within the Act of 1765, the presence of the debtor in the State, must be such as to enable the creditor to avail himself of it. A secret, concealed, clandestine presence, for any length of time, of which the creditor could not take advantage, would not be sufficient. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence, and due means, to arrest the debtor.

The Court were called on, to apply this law to a statement of facts agreed on by the parties, and they were bound to decide upon those facts, as in the case of a special verdict; they could make no inferences unless they be of law, or such as are clear, undeniable deductions from the statements agreed on. It is competent for a jury to draw inferences from testimony submitted to them; but that power is not extended to a Court, when required to act on a case stated, where nothing can be supplied by implication. It is stated the defendant was in Baltimore, in April, 1823, purchased other goods from the plaintiffs, and remained there for two days. The first impression made upon the mind, by these facts, might fairly be, that this afforded the plaintiffs an opportunity to sue out a writ, and arrest the defendant; but when we apply the strict rule of law, that the Court must decide upon those facts alone, without deducing any inference from them, or supplying any other fact, to aid them, we

163 will * find all those stated facts may be true, and yet the plaintiffs were not in default. It might be true the defendant was in Baltimore for two days, and that he purchased goods from the plaintiffs, yet if their knowledge of his being there arose solely from the purchase made, and that purchase was made immediately before the defendant left the city, that would not afford them an opportunity to sue out a writ with effect. If it had been stated, that the defendant was in Baltimore for two days, and that the plaintiffs knew he was there for that space of time, laches might be imputed to them; but this is not stated, and the Court could not infer it. The same remarks will apply to the presence of the defendant in Baltimore, in the summer of 1823. He was there, and the plaintiffs knew it; *non constat*, that he was there within the knowledge of the plaintiffs, for so long a time as would have enabled them to have a writ with a reasonable expectation of deriving a beneficial effect from it.

We are, therefore, of opinion, that the Court below, being confined to the facts in the case stated, were correct in the judgment they pronounced.

Judgment affirmed.

BENJAMIN AND WILLIAM RICHARDSON vs. STEPHEN JONES.
December, 1831.

The policy of the law forbids that a trustee should become a purchaser, directly or indirectly, at his own sale; and if he does, such sale may, and will be set aside, on the proper and reasonable application of the parties interested. (a)

The rule, that a trustee shall not become a purchaser at his own sale of the trust property, was not adopted in favor of trustees, but for the protection of the interest of the *cestui que trust*.

Chancery will not interpose and set aside a sale made a trustee, to himself, or his agent, either upon the application of the trustee or the agent. (b)

An order requiring the principal obligor, and the sureties in a bond, given for the purchase money of land sold by a trustee of the Court of Chancery, to pay such purchase money to the trustee, or bring it into Court, or show cause to the contrary by a given day, is purely interlocutory, settles nothing between the parties, and is not the subject of an appeal.

164 Where a sale is made under a decree, or order in Chancery, and no bond or security is given for the payment of the purchase money, the purchaser may be compelled to complete his purchase, by an order on him in a summary way, to pay or bring the money into Court. (c)

(a) Approved in *Mason vs. Martin*, 4 Md. 134; *Iron Co. vs. Sherman*, 20 Md. 134. See *Williams vs. Marshall*, 4 G. & J. 376, note; *Dorsey vs. Dorsey*, 3 H. & J. 315; *Singstack vs. Harding*, 4 H. & J. 146; *Ringgold vs. Ringgold*, 1 H. & G. 9; *Coul Co. vs. Iron Co.* 16 Md. 456.

(b) See *Williams vs. Marshall*, 4 G. & J. 376.

(c) Cited in *Bank vs. Martin*, 7 Md. 345; *Warfield vs. Dorsey*, 39 Md. 304. See note (d), *infra*.

But when a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring a bond to be given, and the sale has been ratified, the purchaser and his sureties cannot be compelled to pay the bond in a summary way, by an order from Chancery. This constitutes a legal contract to be enforced at law. (d)

No action at law will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. That Court enforces its own decrees. (e)

An order of the Court of Chancery, ratifying a trustee's sale where no bond has been given, or the sale is for cash, is considered as amounting to a decree for the payment of the purchase money, and if that Court could not enforce the execution of it, it could not be enforced at all. The trustee cannot, before ratification, which is the completion of the contract, claim to enforce it in equity, nor after ratification can he sue upon it at law.

(d) Cited in *Clagett vs. Worthington*, 3 Gill, 95, and *Stephens vs. Magruder*, 31 Md. 173. Distinguished in *Ridgely vs. Iglehart*, 6 G. & J. 53. Under Rev. Code, Art. 66, sec. 6, the Court has power, on the application of the trustee appointed to sell real estate, to compel the purchaser to comply with all or any of the terms of sale by process of attachment, or other execution suited to the case, or the Court may direct the property to be resold, &c. In *Stephens vs. Magruder*, *supra*, the terms of sale required the purchaser to pay the balance of the purchase money in three equal instalments, to secure which he was also required to give a bond to be approved by the trustee. The Court said: "It is an error to suppose that upon the execution and approval of the bond by the trustee, the purchaser has fully complied with all of the terms of sale, and that the decree no longer operates to enforce the payment of the credit instalments. On the contrary, if he fails to pay the balance of the purchase money at the time or times required by the decree, he is just as much in default, and within the express provisions of this section of the Code, as if he had failed to execute his bond. We are at a loss to imagine why a purchaser for ready money is to be subject to this summary process, whilst a purchaser on time, who equally fails to comply with terms of sale required by the decree is to be exempt. The decree, it is true, directs that the purchaser shall give bond, but it is equally imperative, that he shall also pay the purchase money at the time or times therein specified. Whatever doubts, therefore, may have been entertained in regard to this question, growing out of the decision in *Richardson vs. Jones*, they are in our opinion entirely removed by the explicit provisions of the Code." See *Anderson vs. Foulke*, 2 H. & G. 255, *note*.

(e) Affirmed in *Boyle vs. Schindel*, 52 Md. 7, where the Court said that although this proposition, in the case in the text, was *obiter dictum*, "yet it has always been regarded as an announcement from the highest judicial source in the State, of what was the practice and law in that respect. * * Whatever may be the law in other States as laid down by text writers, we feel bound to adhere to the ancient ways marked out by our predecessors. It is not because decrees of Courts of equity are not of equal dignity and finality with judgments at law, that they are not subjects of suits at law in this State, but because they are so equal and final they require no extrinsic aid from Courts of law to give them full force and effect. Courts of equity within their own jurisdiction have full power to issue judicial writs to enforce their decrees, with equal economy and despatch as at law." See *Alexander vs. Worthington*, 5 Md. 489, citing the case in the text.

Where a bond has been given in conformity to the order of sale, the ratification is an adoption of the bond only.

Where a purchaser at a trustee's sale gave his bond in conformity with the order of sale, but afterwards, by fraud, defeated the action at law brought upon his bond, he may still be made responsible in equity for the purchase money, upon a bill shewing his improper conduct, though in the meanwhile limitations may have barred the bond at law.

APPEAL from the Court of Chancery. In the year 1816, Abraham Jarrett filed a bill in the Court of Chancery, setting forth that he sold certain tracts of land, called Scott's Hopewell, and Beall's Camp, to Arthur Rider, in the year 1811; that Rider paid only part of the purchase money, and took possession of the land; that Rider died intestate, in the year 1814, leaving Arthur Rider, Jr. and Sarah Rider, since intermarried with William Byrnes, his heirs-at-law; that letters of administration were granted to Arthur Rider, Jr.; that the elder Rider was indebted to the complainant on other accounts, and his personal estate was insufficient to pay his debts. Prayer for subpœna to the children aforesaid and William Byrnes, and that the land aforesaid be sold for the payment of complainant's claim. The defendant answered the bill, confessed the claims, and consented to a decree. On the 8th January, 1817, a decree passed for the **165** * sale of the land, and Samuel Richardson was appointed trustee. On 21st January, 1817, the trustee gave bond for his trust, with Benjamin G. Jones and William Richardson as his securities. On the 25th February, 1817, Samuel Richardson as trustee, reported a sale to the Chancellor, of the premises mentioned in the bill, to Benjamin Richardson, as the highest bidder, for \$995.50. On the 6th March, 1817, this sale was confirmed *nisi* the 15th May ensuing, according to the usual terms. On the 4th November, 1817, proof of publication of the order of ratification *nisi* was filed. The trustee filed the bond of Benjamin Richardson, Abraham Jarrett and William Richardson, dated 25th February, 1817, to him, as trustee aforesaid, for the amount of the purchase money, conditioned to be paid on the 25th February, 1818. On the 15th July, 1818, Abraham Jarrett filed a petition in the Chancery Court suggesting the death of Samuel Richardson, the trustee, before he had completed the duties of his trust. The Chancellor thereupon appointed Robert Richardson trustee. In July, 1822, Jarrett filed another petition, suggesting that Robert Richardson would not act as trustee, whereupon the Chancellor appointed Stephen Jones to complete the said trust. Jones bonded on the 28th November, 1822, which was approved on the 7th January, 1823. On the 29th August, 1828, the sale made and reported by Samuel Richardson was finally ratified by the Chancellor. On the 31st March, 1829, Benjamin Richardson filed a petition in the cause aforesaid, setting forth the bill, answer and decree aforesaid, and alleged that, "as the day appointed for the sale approached, the said Samuel Richardson and Abraham Jarrett came to

your petitioner, and informed him they had come to a determination to buy said land for their own use, and begged your petitioner to act as their bidder at the sale; they informing your petitioner, at the same time, that it was necessary when a trustee bought in property for himself on speculation, to have a third person to bid it off for him, and assigned as a reason, that he must make the deed, and he could not deed to himself. Your *petitioner refused to do this, saying; he did not understand the business, and knew **166** nothing about the Chancery Court; but, on the said trustee's urgent importunity, and his positive assurance that it was all right, and that the trustee, and A. Jarrett, would pay the Chancellor for the land, he consented to oblige them, to bid in said land, and afterwards on their like assurance, and that it was all innocent matter and form, and that he must bond as the nominal purchaser, he consented to bond for said property in the manner and for the sum the trustee pointed out to him. The petition further stated, that immediately after the sale, the said trustee and Jarrett, entered into the exclusive possession of the land. and on the 22d April, 1817, they began to sell off said land as proprietors thereof; they sold a part to one Wallace, as will appear by a written receipt of Jarrett, hereafter to be exhibited. In the winter after Samuel Richardson's death, the said Abraham Jarrett took the surveyor of the county, and had the land laid off into three parts. In December of the same year, the petitioner was induced by Jarrett to give his consent, that he, Jarrett, should sell said land in his own name and the name of petitioner, but with the perfect understanding, that he, the petitioner, had no sort of interest therein, and was only consenting to have his name used as it was used in the bid. The said Jarrett sold the first part to Benjamin Gibson, the second to James Wallace for \$335.50, and the third part to Samuel Bradford for \$678, and took obligations to himself, Jarrett, and this petitioner. A bond of Wallace, and Bradford's note were handed to the petitioner, but he has never received a cent on them, he has no claim on them, and wishes to deliver them to whomsoever the Court may direct. The petition then shows the the appointment of Jones, as trustee, and alleges that by the procurement of Jarrett, Jones caused a suit at law to be instituted in Harford County Court, upon petitioner's bond, given under the circumstances aforesaid; that before the said suits came to trial, the widow and administratrix of Samuel Richardson, feeling and knowing the unjust and fraudulent nature of the * same, gave a receipt in full, as the readiest means of arresting so wrongful **167** a procedure, and shielding an innocent defendant. On the production of the receipt at the trial, the said suit was non-suited. The petition also alleged that the said Jarrett received much money from his own sales of the said land, and that after Jarrett had sold said land in parcels, as aforesaid, and received the notes and bonds aforesaid, for the purchase money, he caused several suits at law to be

brought on them in his own name, and that of the petitioner; that the petitioner knowing that he had no rightful demand against the makers of said notes and bonds, had those suits struck off the docket, And that the said Jarrett thus being frustrated in all his attempts to reap the fruit of his fraudulent collusion with the said Samuel, and fraudulent imposition on this petitioner, resolved on another course, and on the 7th February, 1825, caused the said Stephen Jones to file a bill on the equity side of Harford County Court, to compel the payment of said bond. To this bill your petitioner filed his answer, as did his securities on the bond, setting forth fully the circumstances of fraud aforesaid; a commission issued, and your petitioner, upon a very full inquiry into all the circumstances, and producing proof of them, was enabled to satisfy the Court of the iniquity and injustice of the suit. At August Term, 1828, the cause was finally argued, and the said Court thereafter dismissed the said bill with costs. All these proceedings will be exhibited, and are prayed to be considered as part of this petition. Your petitioner also shows that after the argument of the cause aforesaid, and before a decision of it, the counsel of the complainant (Jones) applied to the Chancellor, procured a final ratification of the sale, and laid it before the Judges of Harford County Court, before the decree of dismissal aforesaid was pronounced. Your petitioner further shews, that notwithstanding all the proceedings aforesaid, and notwithstanding the whole matter has been solemnly passed on after a full investigation by a tribunal of the complainant's (Jones') own choosing; your petitioner is now menaced * with an application for an attach-

168 ment, or some other compulsory process, to compel your petitioner and his sureties to pay the amount of the bond aforesaid. Prayer to be protected therefrom by order of the Court of Chancery, that his bond may be given up to be cancelled; that the said Stephen Jones may report to this Court on the matter of this petition and his trust; that notice may be given to the parties in the original suit, viz: Abraham Jarrett, Arthur Rider, Jr., William Byrnes, and Sarah, his wife, to answer the petition, and for general relief, &c.

Arthur Rider answered the petition of Benjamin Richardson, and stated, that with many of the facts of the petition he was entirely unacquainted, and consequently could neither confess nor deny them; that he now is, and has long since, been entirely convinced that there was a fraudulent collusion between Abraham Jarrett and the late Samuel Richardson, in the sale of the land mentioned in the petition, and unites in the prayer, that the same may be set aside; that he has a brother, Richard Rider, who resides in England, but who was not a party to the original bill, who is one of the children and heirs-at-law of Arthur Rider, deceased:—prayer to be dismissed without costs.

William Byrnes and wife also answered the petition, declaring their ignorance of most of the facts, and belief in a fraudulent com-

bination between A. Jarrett and S. Richardson, to sell Arthur Rider's land, and purchase it themselves, whereby the heirs of Rider would be injured : prayer to be dismissed without costs, &c.

Abraham Jarrett's answers to the petition aforesaid—alleged that at the time Samuel Richardson, the original trustee, was about to sell Rider's land, he came to this respondent, and expressed a wish to buy the said land, but alleged, he entertained some apprehension that he might not be able to pay for it when the purchase money became due, and solicited this respondent to join him in the purchase, assuring this respondent that he would ultimately take the whole of it, but that he wished the respondent to join him in the purchase * only to assist him in paying for said land in the first instance; that he agreed to join said Samuel, who informed him he had procured his brother, Benjamin Richardson, to bid in said land, who bought it, being the highest bidder. That respondent felt bound to aid Samuel in paying for the land; that Samuel entered into the full and exclusive possession thereof, and sold a few acres thereof to James Wallace, for which Wallace paid this respondent and Samuel, by transferring a claim he had upon another person. That Samuel soon after died, leaving his affairs out of order, and respondent being importuned by Benjamin R., who had now become uneasy as well for himself, who had bonded as purchaser, as for his deceased brother's wife and children, suggested to said Benjamin, that they might raise the purchase money by a re-sale of the land; he assented, and it was agreed that the land should be re-sold at public auction, by respondent and petitioner—to that end the land was divided and sold as alleged by the petitioner, in three parcels; one to Samuel Bradford, who bought, as this respondent understood, for himself and for William Richardson, the security of the petitioner; another parcel was sold to Wallace; another to Benjamin Gibson. After the sale, and the purchasers had given bond, at least Bradford and Wallace, and the said Bradford had permitted the said William Richardson, who was a party to the bond for the purchase money, to take and purchase for his own separate use, in consequence thereof the said William R. entered into the possession of said land. When the purchase money became due, the respondent, who held the bonds for the same in his possession, at the request of the petitioner, instituted suits in Harford County Court, against said Bradford and William R., and hearing no complaint or objection to his recovery, expected at the trial term, to obtain a judgment, when, to his astonishment, the said petitioner, who was a co-obligee in said bonds, came into Court and had the suits therein discontinued. The respondent then informed said petitioner, if he intended to claim the bonds for the purchase money * arising from the second sale, he must expect to pay the original purchase money, and the said petitioner desired to have said bonds, which were delivered to him. Respondent then declined any further interference with

said land, and applied for the appointment of Stephen Jones as trustee, to complete original trust. That suit was brought upon the bond for the first sale, and defeated by collusion, as stated in the petition; that the trustee (Jones) then filed a bill on the equity side of Harford County Court, and at the hearing thereof, it was objected by the said petitioner, that said Court had no jurisdiction, and the cause properly belonged to the Court of Chancery, and that the said sale had not been finally ratified, and the bill aforesaid was then dismissed upon these grounds, and not upon the merits; that after said petitioner had manifested his intention of being considered the real purchaser by the course he pursued, respondent assigned his claim on the premises and has now no interest; and he denies that Jones has acted except in the course of his duty, and in good faith. That since the sale in 1819, William Richardson and James Wallace have been in the possession of the land sold by them, enjoyed its rents and profits, cut a large quantity of wood and timber, and diminished its value one-half, and that other persons than respondent are interested in the sale of said land; that the second sale was made at the request of Benjamin and William Richardson, and would have paid the original claim but for the misconduct aforesaid, &c.

Stephen Jones, the trustee, at the same time reported to the Chancellor, that he ascertained what the records of the Court of Chancery showed to have been done prior to his appointment, and not knowing anything concerning the circumstances attending said sale, and believing he had nothing to do but to collect the purchase money, instituted a suit on the bond; at the trial term, under a plea of payment, the defendant produced the receipt of the administratrix of the former trustee, in whose name the suit was brought, for the use of the trustee; upon which your * trustee was compelled
171 to *non pros.* said suit. Your trustee, believing said receipt to be fabricated and ante-dated, filed a bill on the equity side of Harford County Court—his action at law, at this time, being gone, by one of the sureties in said bond becoming, on the death of the said administratrix, (which had then occurred) the administrator *d. b. n.* of the former trustee, to whom said bond was given; and by the answers filed to the bill, your trustee was first informed of the alleged circumstances attending the original sale. That bill was objected to at the hearing, on the ground of want of jurisdiction, and the sale not being finally ratified; and therefore was dismissed as he has understood. The report then states the possession, use and enjoyment of the land, after the first and second sales, as alleged in Jarrett's answer, and denies all collusion. Prayer that the sale may not be set aside, and that Benjamin Richardson and his sureties, William B. and Abraham J. may be ordered to pay the original purchase money, according to the condition of the bond given therefor, which is herewith exhibited, &c.

The bill on the equity side of Harford County Court, referred to in the proceedings aforesaid, was filed by Stephen Jones, on the 7th February, 1825. It set forth the proceedings in the original cause as they appeared in the Court of Chancery, except the order of final ratification. The suit at law by him, against the parties in the original bond, in Harford County Court, and the special manner in which it was defeated by fraud, as hereinbefore stated, and that no money had been paid on the original bond; that the receipt which bore date in 1822, was, in fact, given in 1824, and procured by B. and W. R. It also alleged the death of Samuel's administratrix, and the appointment of William as his administrator *d. b. n.*, and the impediment which that appointment interposed at law. Prayer that Benjamin R., William R., and Abraham Jarrett, may be decreed to pay and satisfy the sum of money mentioned in the condition of the bond, given as aforesaid, with the interest thereon, * and costs of the non-suit, which the said Jones has paid, and for general relief, &c. **172**

At June Term, 1825, Abraham Jarrett, filed his answer to Jones' bill, admitting the proceedings in Chancery, and denying all knowledge of the transactions between Benjamin and the administratrix of Samuel R., on the receipt aforesaid; that, being surety, he gave no attention to the suit which was defended by the other parties thereto, and knows nothing of that suit, save what the record discloses. Consents to any decree which the Chancellor thinks proper to pass.

At March Term, 1827, Benjamin Richardson answered the bill of Stephen Jones, admitting the proceedings in Chancery, and charging, that Jarrett and Samuel Richardson combined to become the joint purchasers of the land aforesaid. The answer then set forth the circumstances of the application to the respondent, as mentioned in his petition to the Chancellor, in this cause. His purchase of the land; his giving bond; the suit in Harford County at law, upon this bond and its defeat, by the mode stated in the bill; and all the circumstances of the second sale, and that he defeated the suits on the bonds given for the second sale, because the obligors had never in fact, delivered them to Jarrett, but that Jarrett took them from a table where they lay, while in conversation with the said obligors, about the title of the said land; that Jarrett is the sole mover of the whole affair, and the only person interested in the money sought to be recovered from him. Prayer to have the original bond cancelled, &c.

William Richardson's answer was similar to Benjamin's.

The evidence taken under the bill in Harford Court, established the second sale. That William Richardson, since 1819, has been, and still is, in possession of a considerable portion of land; that large quantities of wood, from 2 to 450 cords, had been cut down and removed from the land since the first sale; that Samuel Richardson,

from the first, claimed the purchase by Benjamin, as for his Samuel's * account, or jointly with Jarrett. That the land, shortly
173 prior to the second sale, was surveyed by order of Jarrett.

The following receipt of Jarrett's was also proved.

"Received, 29th December, 1818, of James Wallace, Esq. an order on Z. O. Bond, accepted on the 29th November, 1817, for \$70, which sum is in full payment for a lot of land, being part of Scott's Hope-well, supposed to contain 4 or 5 acres, as per contract of sale entered into by Abraham Jarrett, Samuel Richardson and the said James Wallace, 22d April, 1817; and which lot of land is part of the same purchased by Benjamin Richardson, at the sale made by Samuel Richardson as trustee, under a decree of the Chancellor, and which was purchased in trust by the said Benjamin Richardson for the said Abraham Jarrett and Samuel Richardson; and on the settlement of that sale and business, this sum is to be accounted for by the said Abraham Jarrett to the said Benjamin Richardson, as part of the money coming to him out of said sale.—Abraham Jarrett."

At the final hearing, on the 2d Monday of August, 1828, Harford County Court passed the following decree: "In this cause it appears to the Court that the complainant is not entitled to the relief prayed by his bill. It is thereupon adjudged and decreed that the same be dismissed with costs. Charles W. Hanson, Thomas Kell."

The evidence taken upon the petition in Chancery, went to establish the fact that the land had been stripped of nearly all its wood since the first sale, and had been chiefly in the possession and cultivation of William Richardson and his tenants. The proof in the equity cause in Harford, was read in this case by consent.

BLAND, C. on the 9th July, 1829, passed the following order:

The matter of the petition of Benjamin R. filed in this case, standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered. The bill
174 states that the plaintiff sold to * Arthur Rider, who is since dead, intestate, a tract of land, and that a large balance of the purchase money still remains unpaid; that the late Arthur Rider became indebted to the plaintiff, on other accounts, which sums also remain unpaid, and that the late Arthur Rider's personal estate is insufficient to pay his debts. His administrators and heirs are made defendants; and by their answer, they substantially admit the truth of the allegations of the bill. Upon which by assent of the parties, on the 18th of January, 1817, a decree was passed, in the usual form, directing the real estate of the late Arthur Rider to be sold, and appointing Samuel R. trustee, to make the sale, who reported that he had, on the 25th of February, 1817, sold the lands to Benjamin R.; upon which, on the 6th of March, 1817, an order was passed that the sale be ratified, unless cause be shown to the contrary, before

the 15th day of May then next. Samuel R. the trustee, died in the month of February, 1818, and by an order passed on the 18th of July, 1822, the present trustee, Stephen Jones, was appointed to complete the trust, after which no further proceedings were had in this Court, until the 29th of August, 1828, when the sale was absolutely ratified and confirmed.

If the plaintiff had asked no more than the payment of the balance of the purchase, and to have his equitable lien enforced for that purpose, he would have assumed the position, and stood upon the ground of an equitable mortgagee, claiming the benefit of specific lien, and consequently the insufficiency of his deceased debtor's personal estate, would have formed no essential part of the foundation of his claim to relief. *Ellicott vs. Warfield*, July, 1829. But the plaintiff has introduced into his bill another claim against the intestate, in addition to that of the purchase money, for which he can only be allowed to obtain satisfaction out of the realty, on the ground of the personal estate of his deceased debtor being deficient. This claim gives to this suit, the nature and character of a creditor's bill, and in such a bill, a plaintiff may introduce all his claims * for the payment of money, however various, even although some may be **175** made in his own right, and others in representative character of executor and administrator; considering this as a creditor's bill, the decree itself should have directed the trustee to give notice to the creditors of the late Arthur Rider, to bring in their claims. It is not however, now too late to obtain an order for that purpose, since the trustee cannot be authorized to distribute in payment, any of the proceeds of sale, until the creditors of the deceased have been thus notified, and an account has been stated by the auditor, and confirmed by the Court. It is certainly now too late, especially in this way, to inquire into the regularity of the decree of the 8th of January, 1817. I therefore put aside every thing upon that head, which was so much urged in the argument. The petitioner, Benjamin R. admits that he became the purchaser, as reported by the trustee, and that he gave bond for the payment of the purchase money, with A. J. and W. R. as his sureties, but he avers that he consented thus to be named and reported as the purchaser, with no view whatever to his own benefit, but for the sole and exclusive use and behoof of Abraham J. and the late trustee, S. R., at whose express solicitation, and in whose behalf alone, he acted, and consented to be represented as the purchaser, because, as was distinctly understood and stated at the time, the trustee, Samuel, could not himself become a purchaser at his own sale; and such appears to have been the fact and truth of the matter. There was nothing improper in Jarrett's becoming a purchaser. But a sale, however apparently fair, or in whatever way covered to a trustee, is forbidden by the policy of the law; and therefore, had this sale been objected to on that ground, within any reasonable time, it certainly could not have been ratified. But I know of no

instance in which a mere *particeps fraudis*, one who has lent himself as a cover to a sale to the trustee himself, has been allowed to come in, and have it vacated, merely because of its having been in fact

176 made to the trustee, and on * that ground alone. Looking to all the circumstances of this case; the time that has been suffered to elapse,—the good price for which the land has been sold, and the waste and injury it has since undergone, I should doubt the propriety of simply rescinding this sale, even at the instance and special prayer of the defendants themselves. But I can see no good reason why the petitioner, B. R. should have it vacated, or why he should be released from the responsibility to which he voluntarily, and with a perfect knowledge of all circumstances, has subjected himself. In allowing himself to be reported, and his bonds to be returned here, as the purchaser, when, in truth, he was not the purchaser, he practised an imposition upon this Court; and in availing himself of the form of the action at common law, in the name of the administratrix of the late trustee, Samuel Richardson, because his bond had been so made payable, to procure a receipt in full for the purchase money from the nominal plaintiff in that action, when, in truth, he had paid no part of it, for the purpose of preventing a recovery, he practised a fraud upon the agent of the Court, and an imposition upon the Court of common law. Surely he who comes here openly avowing all this, ought to allowed again to shore by justice, to baffle the Court, and to scoff at the law. Under all such circumstances, to set aside this sale would be to allow a man openly to profit by his own wrong; it would be to make that sound general rule of equity, which prohibits a trustee from becoming a purchaser at his own sale, a direct instrument of gross fraud. Whereupon, it is ordered, that the petition of Benjamin Richardson be, and the same is hereby dismissed with costs.

And upon the report and representation of the said trustee, it is further ordered, that the said B. R. the purchaser, and A. J. and W. R. his sureties, forthwith pay to the said trustee, or bring into this Court, the whole amount of the said purchase money now due, together with legal interest thereon, or shew good cause to the contrary, on the first day of September next. Provided a copy of this

177 order be served * on the said B., A. and W. on or before the last day of this month. And it is further ordered, that the said trustee give notice to the creditors of the said late Arthur Rider, by causing a copy of the following order to be published in some newspaper, twice a week for three successive weeks, before the 20th day of August next: and that the creditors of the late Arthur Rider file their claims, together with the vouchers thereof, in the Chancery office, on or before the 20th day of November next.

From which order the said B. and W. R. on the 17th day of August, 1829, prayed this appeal.

The cause came on to be argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Speed, for the appellants, contended that the proof showed the sale of the property mentioned in the proceedings, was made by the trustee, Samuel Richardson, to himself, and Abraham Jarrett, the complainant in the bill, through the agency of the appellant, Benjamin Richardson: that the trustee, in pursuance of that sale, took possession of the property, and retained it until his death: that Jarrett, after the death of the trustee, entered and kept possession of the same property until the second sale mentioned in the proceedings: that the petitioner, who seeks relief in this case, never had possession: that the sale was not finally ratified until the 28th of August, 1828: that Jarrett had sold his interest in the proceeds of the property, and that the purchaser from him was not a party: that William Richardson, one of the appellants, has improved the land, and greatly increased it in value, since the sale. These positions of fact, he contended, were established by the evidence in the cause. He said the sale made by the trustee to himself, through an agent, was void, not voidable; and that the heirs of Rider, the original defendant, never having acquiesced in that sale, it was void, *and gave the present trustee, Jones, no right to claim the purchase money upon that sale. That the fact of the sale 178 being public, a fair price being obtained, and even if the sale had been ratified in season, would not alter the rule of the Chancery Court. *State vs. Reed*, 4 H. & McH. 11; *Davis vs. Simpson*, 5 H. & J. 147; *Sinstack vs. Harding*, 4 H. & J. 186; *Davou vs. Fanning*, 2 Johns. Chan. Rep. 252. He contended there had been no acquiescence in the original sale, on the part of the defendants: that the first trustee, and the complainant, had managed the property among themselves: that for five years there had been no trustee, in fact, and the original parties never notified of the fraud, and therefore never in a situation, nor called upon to acquiesce: that this petitioner was not too late to contest the validity of his purchase with Jarrett: he had always opposed the claim, whenever Jarrett attempted to enforce it against him, and had never acquiesced in it: that for these reasons, the decree of the Chancellor should be reversed. To sustain it, would only permit Jarrett to reap the benefit of a legal fraud, upon the practice and proceedings of the Court, and that in fact, he was the only party in interest before the Court, as complainant. The trustee, Jones, was acting for his benefit, or of those who took the demand, subject to subsisting equities against him.

Taney, (Attorney-General U. S.) *Gill*, and *Alexander*, for the appellees, contended, that as to William Richardson's appeal, it must be dismissed. In relation to him, the decree was a mere order to pay the purchase money into Court by a given day, or shew cause to the contrary, on or before that day. Such an order settled no right in relation to him. Upon showing cause, he might avail himself of any

meritorious, or even technical objection to his paying the money. As to the effect of such orders, they cited *Anderson vs. Foulke*, 2 H. & G. 373. Upon the question of appeal from such an order, at once, upon its being passed, * they cited *Hagthorp vs. Hook*, 1 G. & J. 270 ; *Daniels vs. Taggart*, 1 b. 311. The only inquiry here is, whether the Chancellor had *prima facie* grounds for passing such an order. We contend he had. The report of Jones, the trustee, discloses, that to the bond for the purchase money in this case, William Richardson was a party obligor. He was also the administrator *d. b. n.* of Samuel Richardson, the first trustee. Under such circumstances, an action at law upon, which must necessarily be in the name of the appellant, could not be resorted to. Even if the action could have been maintained, he could not have been induced to sue himself. A resort to equity was manifestly necessary. The facts fully justified the Chancellor's order. Although it is insisted here, that William Richardson's appeal must be dismissed, yet the only motive for dismissing it, would be to prosecute the Chancellor's order. It has been objected here, that the Chancellor could not enforce that order, and compel the appellant, William R. to pay the bond for which he is surety, by attachment, &c.; that over a mere surety he has no jurisdiction ; that the bond is his contract, and he cannot compel the payment of that; the remedy is at law: we answer to that, our remedy at law is gone; the position which W. R. now occupies, as *ad. d. b. n.* of the first trustee, denies us that right. Upon general principles, then, we may resort to Chancery to counteract the effect of the appellant's own proceedings, and obtain relief, which we could not procure in a Court of law.

The remedy which we seek against W. R. will also prevent litigation. His contract shews that he was covenanting with an officer of the Court of Chancery; his bond refers to the original proceedings in this cause, the sale under the authority of the Court. The object of Chancery, is to give relief; to grant full and complete redress. The original complaint was within its jurisdiction. This incidental right, upon which granting relief at last depends, the right of enforcing its contracts, ought not to be refused; that would strip the Court of its natural and appropriate * power: to refuse it, would be to place the Court at the feet of other tribunals. Convenience sanctions this mode of redress. There is no fact in this case, which requires the intervention of a jury. The sealed contract of the party admits the debt. The relief to which W. R. is entitled, if any, is in equity, and that must be the case with all securities who occupy his situation. What sound principle, then, denies jurisdiction to the Court to enforce this contract, and thus put an end to litigation? The practice under English Chancery sales, furnishes no light here; nor do we know of any instance in which our Court of Chancery has actually exercised the power. But considering it fit and reasonable that the Court should possess it, we claim it for that

tribunal, as essential to that forum which grants full relief, by giving a complainant the fruits of his demand, the money. 2. We contend that a party who purchases at a trustee's sale, with a full knowledge of what he is doing, cannot have that sale set aside. That if the same party so far affirms the sale, as to give his bond with security for the purchase money, that is an additional reason, why he should not have the power to set the sale aside. If such a power exists in the purchaser, while all the parties to a cause are satisfied, a Court of equity never can be certain that a sale has been made. There can be no such general rule; there must be some peculiar equity to sanction such an application; some defect of title, some misrepresentation, some fraud; a case in which a purchaser bids in one thing, and is about to get something else. The pretended equity here is, that William Richardson purchased for another, and not for himself. That his principal was the trustee, whose duty it was to make the sale. That as a trustee cannot buy, so, neither can he employ an agent to buy for him. We do not deny, that as a general position, it is true that a trustee cannot, and ought not to purchase at his own sale: good policy forbids such an act. He is not to be tempted to turn his duty to his own profit. The object and sole design of this rule is to protect the *cestuis que trust*. If they do not complain, the law presumes * that there is no ground for complaint; for though the law forbids a trustee to buy at his own sale, it is yet true, that he may give a full and fair price for the property, and thus the interests of the *c. q. t.* be as safe under his purchase, as any other. These considerations have established the rule, that if a trustee purchases for his own benefit, the sale is good till set aside by *c. q. t.* who alone has the right to object. *Wilson vs. Troup*, 2 Cowen, 195; *Lester vs. Lester*, 6 Ves. 631 (*a*;) *Campbell vs. Walker*, 6 Vesey, 678. This appellant claims through his principal. To the same extent we conceive he has rights, but no further. The *c. q. t.* do not object here: the sale is therefore valid. But again; an application to set aside a trustee's sale, must be made in a reasonable time. 1 *Cain's Cases in Er.* 1; *Chalmers vs. Bradley*, 1 Jac. and Walk. 59; *Wilson vs. Troup*, 2 Cowen, 195. It appears here, from the answer of Arthur Rider, Jr., the only *c. q. t.* who asks the Court to set aside the sale, that he has long known of these transactions. The sale took place on the 25th February, 1817; the petition to set the sale aside, was filed in June, 1829; after a lapse of twelve years, can such an objection, even from *c. q. t.* be listened to? We contend that the delay has been most unreasonable. It appears, however, from the proof, and the evidence is not contradicted, that the property sold, has been greatly deteriorated; from 2 to 500 cords of wood have been cut off the land. The Court cannot do justice by vacating this sale. If it could restore the parties to their original rights, and give them the same property, in substantially the same condition, as when sold,

the Court might, with some color of justice, rescind the sale, but that is now impracticable.

The decree in Harford County Court is no bar, it is not relied on as estoppel in the petition. *Neafie vs. Neafie*, 7 Johns. Ch. R. 1.

Johnson, in reply, cited 3 H. & J. 410; *Anderson vs. Foulke*, 2 H. & G. 364; 3 Barn. & Ald. 52; 5 Serg. & Low. 225.

184 * BUCHANAN, C. J. delivered the opinion of the Court. We entirely concur with the Chancellor in the view he has taken of the wily conduct of Benjamin Richardson, the appellant, whose whole course in relation to the subject of his petition bears upon the face of it the deep impress of trick and fraud; and in his refusal to set aside the sale and exonerate Benjamin Richardson from his responsibility for the purchase money of the land, to which he had become subjected by lending himself as a cover to the violation of his duty by an unfaithful trustee.

The policy of the law forbids that a trustee shall become a purchaser, directly or indirectly, at his own sale, and if he does, such sale may, and will be set aside, on the proper and reasonable application of the parties interested. In this case, Benjamin Richardson alleges in his petition that he became the purchaser of the land at the instance, and for the exclusive benefit of Abraham Jarrett, and Samuel Richardson, a trustee appointed by the Chancellor for the sale of it. Thus shewing, that although the purchase was nominally by him, the trustee was, with another, virtually the purchaser at his own sale. And upon that ground, and charging also a fraudulent collusion between Jarrett and the trustee, to whose abuse of trust he admits that he lent himself as a cover, seeks to have the sale vacated; not for the benefit of any whose interest it was that the land should be sold to the best advantage, but to rid himself of a liability in which he has been involved by his own improper conduct. Every step he appears to have taken throughout the whole of his devious course, in connection with this subject, merits the reprobation, rather than the favorable consideration, of a Court of equity. The rule, that a trustee shall not become a purchaser at his own sale of the trust property, was not adopted in favor of trustees, but for the protection of the * interest of the *cestui que trust*. It is not, **185** therefore, on the application of a trustee, to be relieved from his purchase of trust property at his own sale, that Chancery will interpose to set aside such sale. It is only done in behalf of those who are interested in the faithful execution of the trust. To vacate a sale by a trustee, at which he was himself the purchaser, either directly or through the agency of another, (merely on the principle that a trustee shall not become a purchaser at his own sale,) on the application either of such agent, or of the trustee, whenever it may be found convenient, or to his interest, to get rid of the purchase, would be an abuse of the rule to the prejudice of the *cestui que trust*;

and in the emphatic, and very appropriate language of the Chancellor in this case, to make the rule, "a direct instrument of gross fraud." The order therefore, of the Chancellor, so far as it relates to the dismissal of the petition of Benjamin Richardson with costs, will be affirmed. But so far as it directs Benjamin Richardson, and Abraham Jarrett, and William Richardson, his sureties, to pay the purchase money to the present trustee, or bring it into Court, or show cause to the contrary, it is purely interlocutory, and professes to settle nothing between the parties; but affords them an opportunity to show, if they can, that they are not bound to pay, or bring the money into Court as directed, and is not, as to that matter, an order from which an appeal will lie. But as doubts are entertained whether a purchaser at a trustee's sale, who has given bond for the purchase money, can regularly be compelled in this summary way, to pay, or bring the money into Court; and a desire has been suggested by counsel, after argument, that we should express an opinion on the question; in order that it may be put at rest, we will very briefly present our views of the subject. Where a sale is made under a decree or order in Chancery, and no bond or security is given for the payment of the purchase money, a practice has grown up in Chancery, and sanctioned by this Court, in *Anderson vs. Foulke*, 2 H. & G. 346, to compel the purchaser to complete his purchase, by *an order on him in a summary way, to pay or bring the money into Court, and that from necessity arising out of the peculiar character of such transactions. No action at law will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. An order of the Court of Chancery ratifying such a sale is considered as amounting to a decree for the payment of the money; and if that Court could not enforce the execution of it, it could not be enforced at all. Before ratification the trustee cannot sue, because until ratified, the sale is not complete and binding; the contract is not perfect—nor can he sue at law after the ratification, because it thereby becomes a sale by the Court; a contract with the Court, and being but an agent, he cannot sue on a contract between the vendee and the Court, and not a contract made and concluded with himself, and the order of ratification vests him with no authority to sue at law for the enforcement of the contract. There is, therefore, in such a case, no person to sue at law, if an action at law would lie to enforce a decree or order in Chancery, and the remedy must be in Chancery. But it may be asked, whence Chancery derives the authority to proceed in a summary way, by order, to enforce the payment of the purchase money; and why not proceed by bill in equity? The answer to which is, that a Court of Chancery having a clear right to enforce its own decrees, and an order of ratification being considered as amounting to a decree for the payment of the purchase money, a purchaser who neglects or refuses to comply with such decree, is in contempt, and may be dealt

with accordingly, by an order in the first instance, (in this State) to bring the money into Court, as preparatory to an attachment. And that looking to an order of ratification, as amounting to a decree for the payment of the purchase money, there is no reason for requiring a proceeding by bill, to compel a compliance with such a decree, which would not apply to any other decree; and that such a course of proceeding would lead to endless and unnecessary circuitry, without any beneficial result.

187 * But where a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring bond to be given, the terms of sale are complied with, and a contract entered into, not with the Court, but the trustee, on which after ratification, he has a full and perfect remedy at law, for enforcing the payment of the purchase money, that is recognized and sanctioned by the order of ratification, which, in such case, is not a decree for the payment of the purchase money, but a confirmation only, of what has been done. And though the contract of sale, being perfected by the order of ratification, it is thereby said to become a sale by Court, yet the terms of sale being complied with, and the purchase completed, by giving to the trustee as required, a bond to secure the payment of the purchase money, the purchaser is not in contempt by the non-payment of it. The contract on the bond not being with the Court, but with the trustee, under the sanction of the Court, and the remedy is by suit on the bond in a Court of law; and Chancery cannot enforce it, as a mere bond for the payment of money, by which the original simple contract of purchase is extinguished. And if the payment of the bond, as such, cannot be enforced by a bill in Chancery, *a fortiori*, can it not be enforced in a summary way, by an order to bring the money into Court. There must be a decree, or order of ratification amounting to a decree, for the payment of the purchase money, as a foundation for an order to bring it into Court. It is not merely on the ground, that the purchase money is remaining unpaid, that such an order is passed, but it is on the principle that there is a decree, for the payment of the purchase money, and the purchaser being in contempt, the order has for its object the enforcement of that decree. Where there is not such a decree, there can be no such order; and an order of ratification sanctioning and confirming a contract of sale, by which bond and security is given for the payment of the purchase money, cannot we think, be construed to amount to a decree for the payment of it. Where the sale is a cash sale, the order of ratification is held to amount * to a decree for payment, which must be enforced in

188 Chancery, there being no remedy at law. But where it is not a cash sale, and bond is given for the purchase money, the order of ratification adopts the bond, which stands in the place of a decree for payment, and is a legal contract, to be enforced at law. Every difficulty has, in this case, been thrown in the way of the recovery of the purchase money by the appellant, Benjamin Richardson; and

by lapse of time, and otherwise, the subject is surrounded by some embarrassment. But he cannot expect to avail himself of the lapse of time, brought about by his own improper conduct; and there is no doubt, that under the peculiar circumstances of the case, the trustee, Stephen Jones, may by a bill properly framed, and against the proper parties, coerce the payment of the purchase money still due.

Decree affirmed, and appeal from the interlocutory order dismissed.

JOSEPH KOLB vs. ANTHONY WHITELEY, Trustee of D. TROWBRIDGE AND J. TAYLOR.—December, 1831.

Where A. and B. who were partners in trade, became embarrassed about the 17th March, and on the 27th applied for a discharge under the insolvent laws, and where, as between the permanent trustee of the insolvents and the defendants, the inquiry was, whether a certain transfer of property made by the insolvents, on the 19th, to the defendant, then a creditor, was made with a view, or under an expectation of being or becoming insolvent debtors, it was *held*, that for the purpose of enabling the jury to find when the intent to seek relief under the insolvent laws originated, declarations of one of the insolvent partners, made a few days before the 20th, that if certain creditors came on them, they must stop payment, or petition—that bills of sale of household furniture executed by them on the 21st, and declarations of one of the insolvents, made at the same time, that the grantee therein (who was not the defendant,) had advanced money to the partners, and they wished to secure him in consequence of the situation they were placed in,—and that entries in the day book of the insolvents, dated the 19th, 20th, 21st and 23rd, shewing a delivery of goods and notes to various persons, and among others, to the defendant, were all * competent evidence for that object, as surrounding circumstances of the transaction, **189** and a part of the *res gestæ*. (a)

When declarations of persons, not parties, to a suit, constitute a part of the transaction under investigation, they are admitted in evidence to show its character, or the speaker's intention. (a)

In an action by the permanent trustee of an insolvent debtor, under the system for the City and County of Baltimore, it is not necessary to produce an assignment from the provisional trustee to him, of the insolvent's effects, nor to show that a majority of the insolvent's creditors recommended him to the commissioners of insolvent debtors as permanent trustee, to support his right to sue in that character. (b)

Per HARFORD COUNTY COURT.

APPEAL from Harford County Court. This was an action of trover for a quantity of leather, which originated in Baltimore County Court, on the 21st of April, 1829, and was afterwards

(a) Approved in *Garner vs. Smith*, 7 Gill, 5; *Miller vs. State*, 8 Gill, 144; *McDowell vs. Goldsmith*, 6 Md. 389, 340; *Curtis vs. Moore*, 20 Md. 96.

(b) See *Gardner vs. Lewis*, 7 Gill, 397.

removed to Harford County Court, upon a suggestion, according to the Act of Assembly.

The appellee in this Court, was the plaintiff in the Court below—issue was joined upon the plea of not guilty.

1. At the trial the plaintiff offered to read in evidence to the jury, the records of the proceedings of Baltimore County Court, except certain interrogatories contained therein, upon the applications of Trowbridge and Taylor, dated March 27th, 1829, for the benefit of the insolvent laws, by which it appeared that said Trowbridge and Taylor were discharged by the said Court, upon the report of the commissioners of insolvent debtors for the City and County of Baltimore, and that the appellee was appointed their permanent trustee, and gave bond with approved security, as such, on the 4th of April, 1829; for the purpose of proving that the said appellee was the duly appointed permanent trustee of said insolvents, and entitled in that capacity, to sue for their effects and rights. To the competency of which evidence for that purpose, the defendant objected, unless the plaintiff first produced an assignment to him from the provisional trustee, mentioned in said proceedings; and unless the said plaintiff also proved, that he was appointed upon the recommendation of a majority in amount of the creditors of the insolvents. But the Court

190 [KELL, A. J.] overruled * the objections, and permitted the proceedings for the purpose aforesaid, to be read to the jury—the defendant excepted. This exception was abandoned in the argument.

2. The plaintiff then proved that the insolvents were curriers and partners on Cheapside, in the City of Baltimore, before and during the month of March, 1829. That Kolb, the defendant, occupied a warehouse next door to them, and was also a currier, and that the witness a day or two before the 20th of March, 1829, was in the currying shop of Trowbridge and Taylor, and they had therein a stock of leather, which the witness, (who was also a currier,) from the appearance of the stock on the shelves, supposed to be worth \$1,200 or \$1,500, and that he was not in the cellar of their store. That on the morning of the 20th of March, the attention of the witness was attracted by the circumstance, that at the back door of Trowbridge and Taylor's store, a dray was loading with leather, which was taken out of the cellar of the store, and was of various kinds. The dray was laden in a hurried and unusual manner, calculated to injure the leather, the quantity of which upon the dray, was worth from \$200 to \$300, and was taken off, the witness knew not where. That it did not stop at the store occupied by Kolb. That in the course of the same morning, witness was called upon to appraise the value of the leather in Trowbridge and Taylor's shop. That the rent claimed from them was about \$75, and after including the tools, &c. there was little more leather in the warehouse than was sufficient to pay the landlord's claim. That whilst the appraisement was going on, the defend-

ant came to the warehouse, and wanted the appraisers to value the articles higher than they were appraising them at; and that when the appraisers were proceeding to the upper story to find other property, that on the lower floor not being sufficient, defendant interfered, and claimed to be the owner of the leather up stairs. The appraisers however went up stairs, and after they had there discharged their duty, they were called down, when defendant paid the landlord, and took the * leather at the appraisalment, and the key of the warehouse, observing that if T. and T. would refund him the sum **191** he had advanced for the leather, they might have it. That on the same day, Kolb, the defendant, came to the store of witness, when upon being asked if he was a creditor of T. and T., he replied that he was not then a creditor—that he had been satisfied in leather, &c. and had given them up their notes, which amounted to from \$500 to \$600. He did not say when he had received the leather. The witness was told by said Kolb, at a subsequent time, that he had received a letter from Whitely, the plaintiff, as trustee of T. and T., requesting him to come up and settle his claim against him. T. and T. were in good credit until one Myers absconded from Baltimore, which was, the witness thought, from eight to ten days before the 20th of March, and then it was generally known that T. and T. were affected by Myers' affairs. The plaintiff proved by another witness, that defendant called on him (the witness) within a day or two after the 20th March, and stated, that the insolvents had been indebted to him, but that they had satisfied or paid him, and he invited the witness in his shop to look at some calf skins, which had the appearance of having then been recently moved, not being dry. The plaintiff further proved, that about the time he was appointed trustee, the defendant, in a conversation with another witness, about the affairs of the insolvents, expressed his determination to hold on to the leather he had got from them; which conversation being communicated to plaintiff, he wrote and sent the following letter to defendant: "Mr. Joseph Kolb,—Sir—From the books of Trowbridge and Taylor, I learn that a considerable amount of stock was handed over to you by said T. and T, immediately previous to, or about the time of their application for the benefit of the insolvent laws. It becomes my duty as trustee for the creditors, to seek to recover said stock, as the property belonging to the estate of insolvents. I therefore respectfully notify you to deliver over the said stock and property to me, in order that the * same may be fairly distributed amongst the **192** creditors of said insolvents. Yours respectfully, A. Whitely, trustee. April 10, 1829." Which the defendant, upon its being handed to him, opened and looked at, and then threw it into the street, telling the bearer of it, that if the writer was there, he would serve him in the same manner. The plaintiff further proved, that Myers absconded on the 17th of March, 1829, and came back to Baltimore, and was arrested and sent to prison on the night of

the 23rd of March, and that T. and T. were jointly responsible with him on various notes to a large amount, in the possession of the Mechanics Bank and others, and that a note on which they were endorsers, was protested on the 19th of March, 1829, and notice given to them on that day. The defendant proved that the insolvents paid a note which became due on the 15th March, 1829, and that Myers' estate divided twenty-five cents in the dollar, and will divide five cents more, and that the plaintiff, as their trustee, had not demanded or received any dividend on the estate of Myers. The plaintiff then proposed to prove, that some few days before the 20th March, 1829, Daniel Trowbridge, of the house of T. and T. informed the witness, that if Myers' creditors came on them, they must stop payment or petition, though they had enough to pay their own debts, and that they were endorsers on Myers' paper to a large amount. The defendant objected to the admissibility of this evidence, for the following reasons: 1. That no declarations of the insolvents, after the alleged delivery of leather by them, are admissible for the plaintiff. 2. That no declarations before the time of delivery of the leather, are admissible for plaintiff. 3. Because the said declarations do not appear to have been made at the time of the said delivery of leather, nor with reference thereto. But the Court admitted the said declarations, and instructed the jury, that if the said declarations were made by Trowbridge anterior to the time of delivery to Kolb, (if there was such a delivery,) that then they might consider the same in forming their opinion, whether the said T. and * T. at the period of said delivery, delivered the **193** same with a view, or under an expectation of becoming insolvent debtors. The defendant excepted.

3. The plaintiff then proved that the defendant, since the commencement of this suit, said, that he had got leather for his claim against Trowbridge and Taylor—that he had tried to save himself, in doing which, he had done no more than other people would do in similar circumstances: and also read in evidence two bills of sale, executed by the respective insolvents, on the 21st of March, 1829, to Reuben Trowbridge, conveying to him a variety of household furniture: and offered to prove, that John Taylor, one of the insolvents, on the date of the execution of the bills of sale, informed the conveyancer, that Reuben Trowbridge had advanced money to them, and that they wished to secure him, in consequence of the situation they were placed in by Myers, and that they would have to petition. To the competency of the bills of sale, and the information derived from said Taylor, the defendant objected. But the Court overruled the objection, and permitted the evidence to go to the jury, for the purpose of showing that the insolvents were dispossessing themselves of their property, and for the purpose of enabling the jury to ascertain when T. and T. first had in view, or were under an expectation, of being or becoming insolvent debtors. The defendant excepted.

4. The plaintiffs, then, for the sole purpose of showing that the insolvents, on the 19th, 20th, 21st, and 23d of March, 1829, were disposing themselves of their property generally, with a view, or under an expectation, of being or becoming insolvent debtors, and to enable the jury to fix the time at which such view or expectation originated, offered to read in evidence certain entries in the day book of the insolvents, which it was admitted were genuine, by which it appeared that at those dates, they transferred to the defendant and others, a large amount of goods, and received payment chiefly in their own paper. To this evidence the defendant objected upon the ground, that the said entries were inadmissible; and also, that they ought not to be read, unless the names of the parties attached to them, and particularly that of Joseph Kolb, should be omitted; but the Court permitted the entries to be read for the purpose aforesaid. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Krebs, for the appellant, cited 1 *Philips' Ev.* 186, &c.; *Dorsey vs. Dorsey*, 3 *H. & J.* 410; 1 *Serg. and Rawle*, 526; 1 *Saund. Pl. and Ev.* 303; 1 *Philips' Ev.* 219; 4 *Esp. Rep.* 233; 1 *Ib.* 255; 12 *Serg. and Rawle*, 328; 14 *Massa.* 245; 12 *Ib.*; 5 *Johns.* 413.

Johnson and Gill, for the appellee, cited 1 *Stark. Ev.* 46, 7, sec. 28; *Ib.* 48, sec. 29; 5 *H. & J.* 97.

STEPHEN, J. delivered the opinion of the Court. This is an action of trover, instituted by the appellee, as trustee of Trowbridge and Taylor, to recover from the appellant certain property, transferred by Trowbridge and Taylor to the appellant, who was their creditor at the time they became insolvent. In the course of the trial of the cause, the plaintiff offered in evidence certain declarations of one of the insolvents, a short time prior to the transfer, relative to the pecuniary embarrassments of the firm, and also certain entries in their day book, for the purpose of showing that they were disposing themselves of their property, * generally, with a view or under an expectation of becoming insolvent debtors, and 196 to enable the jury to ascertain the time, when such view or expectation originated; a part of which entries went to show that they were disposing of large quantities of leather, part of their stock in trade, and of which article they were manufacturers. To the admissibility of these declarations and entries, the defendant, by his counsel objected, but the Court overruled the objection and suffered the testimony to be given to the jury; the defendant excepted, and whether or not such testimony was legally admissible for the purpose for which it was offered, is the question, which this Court is now called upon to determine. The insolvents applied for the bene-

fit of the insolvent laws on the 27th of March, 1829; on the 20th of March of the same year, the transfer of the leather was made to the defendant, for which this action was brought. (Here the Judge adverted to the bills of exceptions, and then said :) By an Act of the General Assembly, passed in 1816, ch. 221, sec. 6, it is enacted, "that all deeds, conveyances, transfers, assignments, or sales of any property, real, personal or mixed, or of any debts, rights or claims, to any creditor or creditors, security or securities, which have been, or shall hereafter be made by any person, with a view or under an expectation of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference to such creditor or creditors, security or securities, shall be absolutely null and void." And it further provides, that such property shall vest in the trustee of the insolvent debtor, as effectually as any property specified in his schedule. To enforce the provisions of this section, and to recover the property transferred, was the object of this suit. It became necessary, therefore, to prove to the jury, that at the time of the transfer and delivery of the property to Kolb, the insolvents contemplated becoming insolvent debtors; and to establish that fact, the entries and declarations were offered in evidence. The rule is well settled, that where the expressions heard, constitute a part of the transaction, * they are admitted to show its character, or the

197 speaker's intention; as the declarations of a trader on leaving home, to show an act of bankruptcy, *2d Saund. P. and E.* 66. Hearsay is often admitted in evidence, as part of the *res gestæ*; the meaning of which seems to be, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible evidence for the purpose of shewing its true character. Thus: for example, in an action by the assignees of a bankrupt, the bankrupt's declarations, at the time of his absenting himself from his home, are properly received in evidence, to show the motives of his absence. In the case of *Bateman vs. Bailey*, therefore, where the question was, whether the trader's departure from his dwelling-house, amounted to an act of bankruptcy, the Court of King's Bench were of opinion that the reasons which he gave for his absence, after his return home, ought to have been admitted in explanation of his own act. *1st Philips' Ev.* 202. What a bankrupt said at the time of his doing an act, alleged as the act of bankruptcy, is receivable in evidence as being part of the *res gestæ*, and as evincing the intent with which the act was done, *1st Saun. Plea. and Evi.* 68. Speaking on the subject of presumptive evidence, *Starkie*, in his *Treatise on Evidence*, 1 vol. 19, says, "The necessity of resorting to presumptive evidence is manifest. It very frequently happens that no direct and positive testimony can be procured; and often when it can be had, it is necessary to try its accuracy and weight, by comparing it with the surrounding circum-

stances;" so (p. 39) he observes, "From what has been said, it seems to follow that all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference, as to the question in dispute; for as has been already observed, so frequent is the failure of evidence from accident or design, and so great is the temptation to *the concealment of truth, and misrepresentation of facts, 198 that no competent means of ascertaining the truth, can or ought to be neglected." "Hence it follows, that facts remote from and irrelevant to the issue between the parties, are inadmissible, for no presumption can safely be drawn from them; and if such evidence does not tend to prejudice and mislead the jury, at least, it unnecessarily consumes the time of the Court. The evidence must be confined to the fact or point in issue." When A, the holder of a bill, deposits it with B, as security for the balance of accounts between them, and after it is due, B endorses it to C, in an action by C against A, the account book of B is not evidence in diminution of the balance between A and B, but a contemporaneous entry or declaration would have been admissible. *2nd Saun. Plead. and Ev.* 557. So, "where the party against whom the evidence is offered, was privy to the act, the objection ceases, it is no longer *res inter alios*. And in general, where the evidence is offered as a mere fact which is connected with the matter in dispute, and not with a view to affect the party, otherwise than as the actual existence of the fact affects the nature of the transaction itself, then, although it was a transaction between others, yet as a mere fact, and part of the *res gestæ*, it is evidence." *1st Starkie Ev.* 52. Here the evidence was offered as a mere fact connected with the matter in dispute, and not with a view to affect the party otherwise, than as the existence of the fact evinced the nature and character of the transaction. The declarations offered in evidence in this case were made by the insolvent immediately, or a few days preceding the transfer in question, and tended directly to prove his contemplated or apprehended insolvency, and the entries showing a disposition of their effects to particular creditors, were also facts not remote from, but contemporaneous with, and immediately preceding, and subsequent to, such transfer; they were, therefore, in the language of *Starkie*, part of the *res gestæ*; nor can such declarations or entries be considered as made from sinister motives, because there was then no *controversy or *lis pendens*, in relation to the transfer, and the insolvents had no reasonable motives to 199 misrepresent the truth.

We are, therefore, of opinion in this case, that the Court below were right in receiving the declarations and entries as surrounding circumstances of the transaction, and a part of the *res gestæ*, showing the insolvent situation of the parties at the time, and that they

contemplated becoming insolvent debtors, in consequence of the derangement of their affairs, and their utter inability to pay their debts.

Judgment affirmed.

JOHN T. HOXTON AND WIFE'S Lessee vs. JOHN ARCHER *et al.*
December, 1831.

It is a general rule in the construction of wills, that a limitation which may operate as a remainder, shall not be construed an executory devise. (a) Tenant in fee, on the 8th May, 1775, devised as follows: "I give and bequeath the whole of my estate, both real and personal, unto my five daughters, to them and their heirs for ever, to be equally divided amongst them; and it is my will, that if either of the said children, die without issue lawfully begotten of their body, in that case, the part of the said child be equally divided among my surviving daughters." *Held*, that this will being made before the Act to Direct Descents, the devisees each took estates tail general, with cross-remainders in fee, under the limitation over to the survivors. (b)

It is a general rule, that where there are no particular and sufficient words used for that purpose, surviving shares in a devise of real property will not, upon the decease of one who took as a survivor, survive again. (c)

APPEAL from Harford County Court. This was an action of ejectment, brought by the appellants, on the 21st February, 1829, against John Archer, Herman Stump, and James Stephenson, the appellees, to recover an undivided interest, in a tract of land, called The Land of Promise. The defendants pleaded not guilty, and took defence on warrant. The following statement of facts was submitted for the judgment of the Court. "It is *agreed in this case, that
200 Nathaniel Giles, died seized of the tract of land for which this suit is brought, some time in the year 1775, having first made his will, legally executed to pass real estate, and which will is as follows: "I, Nathaniel Giles, of Harford County, in the Province of Maryland, being weak in body, but of sound mind and memory, do make and ordain this my last will and testament, in manner and form following, to wit: First, I give and bequeath unto my beloved friend Tabitha Richardson, £25 common money. Item, I give and bequeath unto my friend Sarah Coale, £15 common money. Item, I give and bequeath the whole of my estate, both real and personal, unto my five daughters, by the names of Hannah, Sarah, Elizabeth, Caroline, and Charlotte, to them, and their heirs forever, to be equally divided amongst them; and it is my will, that if either of the

(a) Approved in *Turner vs. Withers*, 23 Md. 40. Cited in *Mason vs. Johnson*, 47 Md. 356.

(b) Cited in *Watkins vs. Sears*, 3 Gill, 496. See *Newton vs. Griffith*, 1 H. & G. 77; *Clagett vs. Worthington*, 3 Gill, 83.

(c) Recognized in *Turner vs. Withers*, 23 Md. 43.

said children, die without issue, lawfully begotten of their body, in that case, the part of the said child be equally divided among my surviving daughters. I do hereby make null and void, all wills made by me heretofore, &c.”—this will is dated on the 8th May, 1775. It is further agreed, that the devisees named in the said will, were the only heirs-at-law of the said Nathaniel Giles, and entered upon the said land, and were duly seized thereof, and that Charlotte, one of the said devisees, died a minor, and without having been married, or having had issue. That afterwards a partition of said land was duly made, between the four surviving devisees; to wit, Hannah, Sarah, Caroline, and Elizabeth, and each entered upon the portion assigned to her by said partition. That afterwards, Hannah, Sarah, and Caroline, all died, each leaving issue, now living. That Elizabeth, after said partition, sold and conveyed the part of said land allotted to her, under such partition, to John Stump, by deed duly executed, acknowledged and recorded, which deed is as follows: “This indenture, made the 16th of May, 1797, between Elizabeth Giles, of Harford County, of the one part, and John Stump, of the said county, of the other part, * witnesseth, that the said Elizabeth Giles, for and in consideration of the sum of £750, to her in hand paid **201** by the said John Stump, the receipt whereof is, &c. hath granted, bargained, sold, aliened, enfeoffed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, and confirm, unto the said John Stump, his heirs and assigns, the following tract, or parcel of land, lying in the county aforesaid, and known in the division by the name of lot number three, and being part of a tract of land called The Land of Promise, beginning, &c. to have and to hold, the aforesaid tract or parcel of land, and premises, with the appurtenances, unto the said John Stump, his heirs and assigns forever.” And it was further admitted, that the title of said Stump is duly vested in the defendants. That said Elizabeth survived all the other devisees, named in the said will of N. Giles, and afterwards herself died in the year 1827, without issue, or having been married, and that the lessors of the plaintiff are the only heirs-at-law of Sarah, one of the aforesaid devisees. It is further agreed, that this suit is brought to recover an undivided moiety of that part of the land assigned as aforesaid, under the partition to Elizabeth. If upon these facts, the County Court should be of opinion that the plaintiffs are entitled to recover, then judgment to be entered for the plaintiff, for one undivided third part of Elizabeth’s part of said land, or for such undivided part as she may be entitled to; but if the Court should be of opinion that the plaintiff is not entitled to recover, then judgment to be rendered for the defendants. It is also agreed that either party may be at liberty to appeal from the judgment which may be rendered upon this statement, in like manner as if the facts herein stated, were stated in a bill of exceptions.

The County Court, with the consent of parties, gave a *pro forma* judgment for the defendants, and the plaintiffs appealed to this Court.

When the case came on to be argued in the Court of Appeals, the following additional statement of facts was * agreed to by the
202 counsel: it was admitted, "that Hannah, Sarah, and Caroline Giles, three of the devisees of Nathaniel Giles, were living at the execution of the deed from Elizabeth Giles to John Stump. That Charlotte Giles, one of the devisees, died an infant, and without issue, before the year 1797. That Hannah died in 1813, Caroline in 1816, and Sarah in 1824, and that their children are the only heirs-at-law of Elizabeth."

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Speed, for the appellant, contended, 1. That under the will of Nathaniel Giles, his daughter Elizabeth took an estate in fee simple, in an undivided fifth part of the real estate devised to her and her sisters as tenants in common, liable to be divested upon the contingency of dying without issue living at the time of her death. 2. That the devise over was good, as an executory devise for life; in support of these two points he cited *Gilbert on Wills*, 54, 5, 6; *Cro. James*, 591; *Cro. Eliz.* 52; *Woodward vs. Glasbrook*, 2 *Vernon*, 388; *Metham vs. Duke of Devon*, 1 *P. Wms.* 534; *Forth vs. Chapman*, *Ib.* 663; *Target vs. Grant*, *Ib.* 432; *Porter vs. Bradley*, 3 *Term Rep.* 145; *Daintry vs. Daintry*, 6 *Ib.* 307; *Roe vs. Jeffrey*, 7 *Ib.* 589; *Fosdick vs. Cornell*, 1 *John.* 440; *Anderson vs. Jackson*, 16 *John.* 382; *Clayton vs. Lowe*, 7 *Serg. and Low.* 218; *Morgan vs. Morgan*, 5 *Day Ca.* 517; *Geering vs. Shenton*, *Cowper*, 410; *Newton vs. Griffith*, 1 *H. & G.* 124; *Doe vs. Webber*, 1 *Bar. and Ald.* 713, 720; 2 *Fearne*, 245; 4 *Com. Dig.* 170. 3. That at the time of the conveyance by Elizabeth to John Stump, in 1797, the estate was in perpetuity, and said conveyance was inoperative on the part she took under the first branch of the devise. *Scatterwood vs. Edge*, *Salk.* 229; *Gilbert on Wills*, 64, 66. 4. That the devise over being only for life, after the death of Charlotte, Elizabeth took a life estate in one * fourth part of
203 her portion, under the first branch of the devise. 4 *Com. Dig. Title Devise*, No. 11, 189; *Woodward vs. Glasbrook*, 2 *Vernon*, 388; *Jackson vs. Thompson*, 6 *Cowen*, 178; *Cro. Eliz.* 358; 2 *Merriv.* 133; *Hawley vs. Northampton*, 8 *Mass.* 3; *Holloway vs. Holloway*, 5 *Ves.* 401; 3 *Wilson*, 247; 1 *Bay*, 80. 5. If by the first branch of the devise, an estate tail only passed, the limitation over for life was good as a remainder, and Elizabeth taking one-fourth of Charlotte's part, as a remainder for life only, could pass no greater interest by the deed to Stump, and that life estate having determined by the death of Elizabeth, we are entitled to recover our portion of it, viz: one-third as heirs of the reversion. 6. If Elizabeth, dying without issue living at

the time of her death, never acquired an absolute fee, and none of the devisees over for life, being in existence to take at the time of her death, the estate reverted, and the plaintiffs as heirs of the reversion, are entitled to recover one-third of the premises in question. 7. If Elizabeth acquired a fee simple absolute in the property she took, under the first branch of the devise, she died, seized thereof; and the plaintiff, as one of her heirs-at-law, has a right to recover one-third part of that property. 8. The estate being in perpetuity at the date of the deed to Stump, Elizabeth, by executing that deed, forfeited all her interest in the property, it reverted—and we, as heirs of the reversion, claim.

Johnson, for the appellee. If at any period between the date of the deed from Elizabeth Giles to Stump, and her death, she acquired a title to the property conveyed, in fee simple or fee tail, no one claiming under her, can recover the property so conveyed; her deed would operate as an estoppel. *Fairtitle vs. Gilbert*, 2 Term Rep. 172; 3 Blac. Com. 308. 2. The will of N. Giles created in his daughters and devisees, an estate tail general, with cross-remainders in tail general to the survivors. If the devisees over, took but estates for life; then, upon the death of Charlotte, Elizabeth took for life, three-fourths of her share of * the estate, and as the inheritance belonged to the heirs-at-law of Nathaniel Giles, of whom Elizabeth was 204 one, she was entitled to one-fourth of the fee, being entitled to a life estate, as one of the devisees over, and the inheritance, as one of the heirs-at-law of N. Giles. The partition vested in her a separate estate in her share, and this separate estate was transferred to Stump by her deed in 1797. This is clearly the case in relation to Charlotte's estate, and the same may be affirmed of her own, at the time of her death. In *Dallam vs. Dallam*, 7 H. & J. 236, it was decided, that the devise over would be construed to be remainder, unless the intention of the testator to the contrary, was perfectly apparent. In devises of real estate, the words dying without issue, or dying without leaving or having issue, mean an indefinite failure of issue, unless an opposite intention is manifest. *Newton vs. Griffith*, 1 H. & G. 115. The question whether a limitation over by way of executory devise is good, does not depend upon, whether the estate limited over must vest within the prescribed limits, but whether the event must happen within those limits. If then, the rule is, that as regards real estate, the "dying without issue" means an indefinite failure of issue, then the limitation over in this will is not good as an executory devise, unless there are some expressions to restrict their import. The circumstance that the limitation over, is to persons in being, is not sufficient. 1st H. & G. 123. Nor as is decided in that case, will the fact, that the limitation over, is but a life estate. It is very clear, that in this case the testator intended to devise his whole estate to his daughters, which object would be defeated by construing the limitation over to be but of a life estate; for then he

would die intestate of the fee. Upon the death of either of the first takers, the testator intended, that the survivors should take the same estate, as the deceased; otherwise, if four of them should die without issue, four-fifths of the estate of the testator, would be undisposed of by his will. Upon the death of Charlotte, Elizabeth took an estate tail in that * portion of the share of Charlotte, which devolved on her. *Lion vs. Burtiss*, 20 *Johns.* 483; *Morgan vs. Morgan*, 5 *Day*, 517. 3. That part of the estate which was devised to Charlotte, and survived to Elizabeth, would not have survived to the other sisters in the event of the death of Elizabeth before them, but would have descended to those who would have been entitled in the absence of a will. At the date of the deed to Stump then, she had an estate tail in this share, not subject to survivorship. But suppose she took only a life estate, under the will, in her part of Charlotte's share; still, as one of the four heirs of testator, she was entitled to the reversion in fee, which added to the previous life estate, gave her a perfect title in fee; and this interest, because one in severalty by the partition, passed by her subsequent deed to Stump.

R. N. Martin, in reply, for the appellant, cited *Dallam vs. Dallam*, 7 *H. & J.* 238; *Chapman vs. Brown*, 3 *Bur.* 1634, 1635; 1 *Bos. & Pul.* 257; *Cooper vs. Collis*, 4 *Term*, 297, note (d); *Cro. Eliz.* 358; 2 *Merri.* 133; *Woollen vs. Andrewees*, 2 *Bing.* 126; *Jackson vs. Thompson*, 6 *Cowen*, 178; *Newton vs. Griffith*, 1 *H. & G.* 119; *Doe vs. Tomkinson*, 2 *Maul. & Sel.* 165; *Prest. on Est.* 76; *Woodward vs. Glasbrook*, 2 *Vesey*, 388; *Pettywood vs. Cook*, *Cro. Eliz.* 52; *Pells vs. Brown*, *Cro. Jac.* 590; *Porter vs. Bradley*, 3 *T. R.* 145; *Roe vs. Jeffreys*, 7 *T. R.* 569; *Doe vs. Webber*, 1 *B. & A.* 713; *Clayton vs. Lowe*, 5 *B. & A.* 636; *Hughes vs. Sager*, 1 *P. Wms.* 534; *Massey vs. Hudson*, 2 *Mer.* 133; *Fosdick vs. Cornell*, 1 *Johns.* 440; *Moffatt vs. Strong*, 10 *Johns.* 12; *Jackson vs. Thompson*, 6 *Cowen*, 178; *Keybing vs. Reynolds*, 1 *Bay.* 80; *Morgan vs. Morgan*, 5 *Day*, 517; *Pinbury vs. Elkin*, 1 *P. Wms.* 563; *Dodson vs. Green*, 2 *Wils.* 324; 3 *Wils.* 247; *Chandess vs. Price*, 5 *Vesey*, 101.

* BUCHANAN, C. J. delivered the opinion of the Court. It is a general rule in the construction of wills, that a limitation, which may operate as a remainder, shall not be construed an executory devise; and we can perceive nothing in the devise of Nathaniel Giles to his five daughters of the premises, for an undivided part of which this suit was brought, to take it out of the operation of that

rule.
If the devisees took estates in fee simple, as has been contended, in strictness, a remainder cannot be limited after a fee simple, the limitation over might be construed to take effect by way of executory devise, by which means, being a disposition by will, which is more in construction than a deed, a fee simple or other less estate, saved.

may be limited after a fee simple. But in *Newton et al. vs. Griffith et al.* 1 H. & G. 111, the whole doctrine applicable to this case was ably discussed at bar, and fully considered and examined by the Court. There the devise was, by a father, of certain land to his son George and his heirs, and of certain other land to his son Joseph, and his heirs; and in case either of them "should die, having no lawful issue or heirs of his body," then the surviving son "to have his deceased brother's part of the land," to him and his heirs; and in case both sons "should die, leaving no lawful heirs," then all the lands to go to the testator's three daughters, Sophia, Sarah, and Nancy, to be equally divided between them; and it was held that the two sons, George and Joseph, as the law stood before the Act of 1786, ch. 45, (the Act to Direct Descents,) took estates tail general in the lands respectively devised to them, with cross-remainders in tail general, remainder to Sarah, Sophia, and Nancy, for life. Here the devise is, by a father, in these words: "I give and bequeath the whole of my estate, both real and personal, unto my five daughters, by the names of Hannah, Sarah, Elizabeth, Caroline, and Charlotte, to them and their heirs forever, to be equally *divided amongst them; and it is my will, that if either of the said children die without issue, lawfully begotten of their body, in that case, the part of the said child, be equally divided among my surviving daughters." And without travelling through the multitude of authorities relating to the subject, but relying upon the decision in the case of *Newton et al. vs. Griffith et al.*, from which, in principle, we think this case cannot be distinguished, it is our opinion that the devisees did not take defeasible estates in fee simple, and that the limitation over cannot be construed to operate by way of executory devise; but being before the Act to Direct Descents, that they took estates tail general, with cross-remainders, under the limitation over to the survivors. It has been ingeniously attempted to distinguish this case from *Newton* and *Griffith*, by construing the limitation over to the survivors, to be for life; and then contending that the limitation for life to the survivors, who were necessarily persons *in esse*, shows that the testator intended a definite failure of issue, that is, a failure of issue at the time of the death of the devisee; on whose decease, without issue, the land devised to her, was to go to the survivors, upon the ground that he must have intended the limitation to take effect during the life in being, and consequently, could not have meant an indefinite failure of issue. But the rule is, not that the limitation over must take effect, within a life in being, but that the contingency on which it is made to depend, must happen, if at all, within the compass of a life or lives in being, and twenty-one years, and a fraction afterwards. Upon that distinction, which, when examined, will be found to be a very clear one, and the argument drawn from the circumstances of the limitation being for life to the survivors, though very specious, yet not to be sustained, one

branch of Newton and Griffith was decided. The limitation over to the three daughters, on the contingency of the sons dying without issue or heirs of their bodies, was of an estate for life, to persons in being, just as strong as a limitation over to a survivor for life, which is * but a limitation for life to one in being, and the limitation

213 over to the daughters was held to operate, not by way of executory devise, but by way of remainder, after estates tail vested in the sons, and not to restrict the words, "leaving no lawful heirs of their bodies," to mean a failure of issue, at the death of the surviving brother; and cannot well be distinguished from the principle of the cases of *Denn vs. Shenton*, Cow. 410, and *Barlow vs. Salter*, 17th Ves. 479, there cited. Construing the limitation over to the survivors in this case, to be in fee simple by force of the words, "the whole of my estate," in the beginning of the devise, and carrying the word estate on to the limitation over, or in fee tail by implication of law, and the question whether the devisees took estates tail, with cross-remainders, is clear of difficulty. But treating it (as has been done by the counsel for the appellant in argument) as a limitation for life only, then Elizabeth, under the authority of Newton and Griffith, took the portion of the real estate devised to her in fee tail general, and if the devisees had not been the heirs-at-law of the testator, would, on the death of Charlotte, without any descendant then living, have become entitled to one-fourth of the portion devised to her, by way of remainder for life, with reversion in fee to the heirs-at-law of the testator. But the devisees, being also the heirs-at-law of the testator, the life estate in the fourth of Charlotte's portion, which survived to Elizabeth, merged in the inheritance, and she became entitled to that fourth in fee simple absolute. There being in this case no survivor over of a survived share, under the general rule that where there are no particular and sufficient words used for that purpose, surviving shares will not survive again, and particularly in relation to devises of real property. *Woodward vs. Glassbrook*, 2 Vernon, 388; *Worlidge vs. Churchill and others*, 3 Brown's Ch. Rep. 465. Having thus a fee simple or a fee tail, in one-fourth of a portion devised to Charlotte, according as the limitation over in the devise is construed, and an estate in tail, in her own original portion, which

214 under the partition made between her * three sisters and herself, after the death of Charlotte, were assigned to her as her portion of the estate derived from her father, her deed made afterwards on the 16th of May, 1797, to John Stump, passed to him a good and sufficient title in fee simple to the land therein mentioned, and so assigned to her upon the partition, and the plaintiffs are not entitled to recover.

Judgment affirmed.

McNULTY vs. COOPER.—December, 1831.

The blank endorsement and delivery of a bond invests the holder with the right of collecting, or suing for, in the name of the assignor, the money due upon such bond; and of appropriating the same to his own use. It is *prima facie* evidence of title to such bond in the assignee, and he may write a formal assignment over the assignor's signature. (a)

The Courts will not lend themselves to a donee or assignee, to enforce an inchoate contract, not founded upon a valuable consideration; neither will they lend their aid to a donor or assignor, in a case where the gift or assignment has been consummated by possession, to recover back what the donee or assignee has received or collected. (b)

APPEAL from Frederick County Court. This was an action of assumpsit, instituted by the appellee, John Cooper, against Cornelius McNulty, the appellant, on the 30th January, 1826, to recover the amount of two bonds, dated on the 21st August, 1819, conditioned each for the payment of \$533.33, which the declaration alleged, the plaintiff, at the request of the defendant, had delivered to, and deposited with the defendant, in the years 1822 and 1823, which bonds, or the value thereof, the defendant promised upon request to return to the plaintiff, but which he had refused to do. In addition to the count upon the special agreement, there were the common money counts. The defendant pleaded *non assumpsit*, and issue was joined.

* 1. At the trial the plaintiff read to the jury, the record of a judgment rendered against him, in Frederick County Court, **215** in November, 1819, in favor of David Morrison, for \$600, with interest from June, 1818, and costs, which judgment was superseded by the defendant, and one William Kolb. He then proved the execution to him of the bonds described in the declaration, by the obligor therein named, with the following endorsements thereon written, to wit: "For value received, I assign over to Cornelius McNulty, all my right, title, and interest to the within bond, as witness my hand, &c."—and proved, that the defendant had received various payments, made by the obligor, from time to time, on account of the bonds. It was admitted by the counsel for the defendant, that the words, "for value received, I assign to Cornelius McNulty, all my right, title, and interest, to the within bond, as witness my hand, &c.," were written and filled up, a day or two before the trial, over the name of the plaintiff, without his knowledge or consent, but the name of the plaintiff written on the back of the bonds, was proved to be in the hand-writing of the plaintiff. The defendant then proved by the

(a) Cited in *Lucas vs. Byrne*, 35 Md. 493; *Hampson vs. Owens*, 55 Md. 586.

(b) Approved in *Bowie vs. Bowie*, 1 Md. 98. See *Pennington vs. Gittings*, 2 G. & J. 123, note.

sheriff of the county, that he had paid, as one of the superseders, on the before mentioned judgment, several sums of money, (though not equal in amount to the bonds,) and thereupon prayed the Court to instruct the jury, that under the evidence in the cause, the delivery of the bonds, by the plaintiff to the defendant, with the name of the plaintiff endorsed on the same, and the acts of ownership exercised by the defendant, over said bonds, in the several receipts of money, paid on the same to the defendant, by the obligor in said bonds, and the defendant's possession of the same, was *prima facie* evidence of title, in the defendant, to said bonds. But the Court (SHRIVER, A. J.) refused the instruction so prayed, and directed the jury, that if they should believe from the whole of the evidence in the cause, taken together, there was an actual sale, or transfer of the bonds by the plaintiff to the defendant, * then they must find a verdict

216 for the defendant. On the other hand, if they should believe from all the evidence in the cause taken together, that there was not an absolute sale, nor transfer of the bonds; or if they should believe the plaintiff had delivered the bonds to the defendant, for the special purpose of enabling the defendant to secure himself against any liability, as superseder for the plaintiff, and when that liability should terminate, to satisfy, or account with the plaintiff, for any moneys he might receive on the bonds, over and above the total sum of the payments he might make for the plaintiff, as his superseder, then, if from the evidence they should believe, that such liability of the defendant had terminated, the plaintiff was entitled to recover the balance of the total sum of money received by the defendant, on the bonds, after deducting the payments, made by the defendant for the plaintiff, as his superseder. The defendant excepted, and the verdict, and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Ross, and F. A. Schley, for the appellants, contended, 1. That the signature of John Cooper, the obligee, on the back of the bonds, and the delivery of them by him, to the defendant, was *prima facie* evidence, that Cooper had relinquished his right to the money due thereon, and had transferred the same to the defendant. 2. That the question of sale, and transfer, was a question of law, founded on facts not disputed, and should not have been submitted to the jury. 3. There was no evidence, from which the jury could infer, that plaintiff had delivered the bonds to the defendant, for the special purpose of enabling the latter, to secure himself, from liabilities incurred as a superseder for the plaintiff, and therefore no such question should have been raised before the jury. They referred in the argument to *Master vs. Miller*, 4 Term Rep. 340; 1 Pow. on Mort. 23 (a); 3 Ib. 1060 (a), note (1); *Jones vs. Witter*, 13 Mass. Rep. 304; 1 Bay, 66,

406; 2 *Greenleaf Rep.* 334; *Green vs. Hart*, 1 *Johns. Rep.* 589; *Jerome vs. Whitney*, 7 1b. 321; *McElderry vs. Flannagan*, 1 *H. & G.* 32; *Clark vs. Ray*, 1 *H. & J.* 323.

Palmer, for the appellee, cited 2 *Greenleaf*, 143, 322; *Chirac vs. Reiniker*, 2 *Peters*, 625; *Caton vs. Veale and Lenox*, 5 *Randolph*, 31; *Cruger vs. Armstrong and Barnwall*, 3 *Johns. Cases*, 5; *Conroy vs. Warren*, 1b. 259; *Dugan vs. U. S.*, 3 *Wheat.* 182; *Chitty on Bills*, 7, 8, 9, 14, 173.

DORSEY, J. delivered the opinion of the Court. We think the County Court erred in refusing to grant the prayer of the appellant, as set out in his bill of exceptions. It is the duty of Courts, when not restrained from doing so by some rule of law, to give to the acts, and * agreements of the plaintiff and defendant, that interpretation which the common sense of mankind would impute **218** to them; and so to effectuate that interpretation, as to accomplish the design and intention of the parties, as far as it can be done, according to the established principles of law. Thus influenced, we cannot do otherwise than say, (in the absence of all proof to the contrary,) that the blank endorsement, and delivery of a bond by the obligee, invests the holder with the right of collecting, or suing for, in the name of the assignor, the money due on such bond, and of appropriating the same to his own use; or, as is stated in the prayer, that it is *prima facie* evidence of title to said bond in the assignee. So far from there being in this case any facts repelling this natural presumption, we regard them as strong in its corroboration, by shewing a probable valuable consideration for the transfer, and that the appellee, for three or four years, took no steps to repossess himself of the bonds, which in his declaration he alleges, were merely delivered to the appellant, to be returned on request; and that during that period, McNulty, in a succession of payments, collected as his own, nearly the whole amount due on the bonds.

It has been alleged, that the prayer of the defendant below, was predicated upon an isolated part of the testimony, and that therefore, the Court were justified in its rejection. If this position, as regards the law, were a sound one, the allegation, as to the fact, is not sustained by the record. The instruction was asked, not simply upon the facts enumerated, but upon those facts, when considered in connexion with all the other evidence in the cause. The argument was strongly urged too, that no title accrues to the assignee; that the claim of the plaintiff could not be resisted, but by its appearing that the transfer was made for a valuable consideration, of which no evidence had been offered. In considering this proposition, let it be conceded that no consideration passed; that the obligee made a gift of these bonds to the appellant. Does it thence * follow, that he can maintain replevin, detinue, trover, or assumpsit, to re- **219** cover the bonds themselves, or their value in damages, or can a

general *indebitatus assumpsit*, be supported against the assignee, for the money he may have received under the assignment? There is no principle, or analogy in the law, to authorize such a recovery. 'Tis true, that neither Courts of law, nor of equity, will lend themselves to a donee, or assignee, to enforce an inchoate contract, not founded on a valuable consideration. But it is equally certain, that they will not lend their aid to a donor, or assignor in a case, where the contract has been consummated. He cannot reclaim by process of law, what he has given or assigned, where the gift or assignment has been perfected by possession. Having endorsed, and delivered the bonds, (of which delivery, the possession of the appellant is *prima facie*, sufficient evidence,) no action, either at law or in equity, can be maintained by the assignor for their recovery; nor for the money which has been collected under the assignment. From the view which we have taken of the testimony in this cause, we cannot approve of the instruction given to the jury. They were instructed, that they might draw conclusions, and infer facts, which the evidence before them was not legally sufficient, to warrant them in finding. Believing there is error in the County Court's refusal to grant the prayer of the appellant, we reverse their judgment. *Judgment reversed.*

DAVID ARNOLD vs. GEORGE COST.—December, 1831.

In an action of slander, it appeared that the defendant had charged the plaintiff with having forged the following instrument, which it was alleged, had been delivered to defendant's slave, to assist his escape:

220 "Know all men by these presents, that the said negro boy was the property of my uncle R. * living near, &c. He died without any heirs; he never was married, therefore he made all his negroes free, by will and testament. This boy's name is S. He always behaved honestly and industriously; is a good hand about horses, and a good wagoner. The farmers in our part have, for common, all slaves or hands of their own, therefore he wants to try some other part. The commissary's office at F. will prove his freedom. Witness, &c. I. (Seal.)" Held, upon demurrer, that this instrument, if genuine, might have prejudiced 'I,' by subjecting him to a claim for damages to the owner of any slave to whom it might have been given, or to a criminal prosecution, if such slave absconded; that it was therefore the subject of forgery at common law, and sustained the action.

It is not now held to be essential to the offence of forgery, in any case, that some one must have been injured. It is sufficient, if the instrument forged, supposing it to be genuine, might have been prejudicial. The question whether a particular instrument is capable of supporting a charge of forgery, is referrible not to the form, but to the substance of it.

ERROR to Frederick County Court. This was an action on the case for slander, commenced by George Cost, (the appellee,) against David Arnold, (the appellant,) on the 27th of January, 1827.

The declaration contained six counts, but a *nolle prosequi* was entered on the fourth, fifth and sixth. The first count, after the inducement of good character, proceeded as follows: and whereas also before the committing of the several grievances by the defendant, as in the first, second and third counts hereinafter mentioned, the defendant was possessed of, and owned a certain negro, named Jerry, the slave and the property of the defendant, and in his service and employment, to wit, at, &c. to which negro slave, to enable him to escape from the service of his master, (the defendant,) some person unknown to the plaintiff, delivered a paper written in the following words and figures, to wit: "Know all men by this present that the said negro boy was the property of my *onkle*, Richard Johnson, living near the mouth of *Monocosa*. He deceased 1821. He died without any *airs*. He never was married. Therefore he *maid* all his negroes free by his will and testament. This boy name is Sam Waker. He always behaved *onest*, and *industrust*, and is a good hand about horses, and a good wagoner. The * farmers in our part *has* for common all slaves or hands of their own, 221 therefor he wants to *dry* some other part, the *commossary offis ad* Frederick town will proof his freedom, herewith I *haf* sat my hand and seal, Thomas Johnson, (Seal) near the mouth of *Monocosa*, Frederick County, Maryland, date 25th September, 1826:" and which paper the defendant had often, before the committing of the several grievances by him, as in said first, second and third counts, hereinafter mentioned, declared to wit, at, &c., to be a forgery, and not written or signed by the said Thomas Johnson, whose name is subscribed to the same: and the said plaintiff further saith, that David Arnold, well knowing the premises, but greatly envying, &c. and contriving, and maliciously intending, &c. and to bring him into public scandal, &c. and to cause it to be suspected, &c. that the plaintiff had been, and was guilty of forgery, and to subject him, &c. and also to vex, harass, &c. heretofore, to wit, on, &c, in a certain discourse which the said David Arnold, then and there had in the presence and hearing of one Henry Koontz, and of divers good and worthy citizens of this State, he, the defendant, in the presence and hearing of the said Henry Koontz, as also of the said last mentioned citizens, falsely and maliciously spoke, and published, of and concerning the said plaintiff, and of and concerning the said paper, and of and concerning the writing and forging the same, the false, scandalous, malicious and defamatory words following, that is to say: "he," (meaning the plaintiff,) "wrote it," (meaning the said paper,) "and I," (meaning the said defendant,) "will swear to it; and I," (meaning the said defendant,) "can get others who will swear to it," (meaning that the said George Cost had wrote and forged said paper, and was guilty of the crime of forgery, and that the said David Arnold would swear to it, and could get other persons who would swear to it.

The second and third counts alleged, that the defendant had charged the plaintiff in the German language, setting * out **222** the words and translating them, with the crime of having forged the paper referred to in the first count. There was a general demurrer and joinder.

The County Court overruled the demurrer. The plaintiff then executed a writ of inquiry; at bar, and the Court gave judgment for the damages (\$700,) found by the jury. Whereupon the defendant sued out the present writ of error.

The cause came on to be argued before BUCHANAN, C. J., MARTIN, STEPHEN and DORSEY, JJ.

William Schley, for the appellant. The questions in this case, arise upon the demurrer to the first, second and third counts of the declaration. The demurrer was overruled by the Court below. Each count is substantially the same. The *colloquium* and *innuendo* are alike in all the counts. The demurrer admits the facts alleged; but not the conclusion of law. If the antecedent matter does not warrant the *innuendo*, then the truth of the *innuendo* is not confessed by the demurrer to raise an issue in law upon the propriety of the *innuendo*, but is directly put in issue. The office of the demurrer is in reference to the antecedent matter. To show the nature and office of the *innuendo*, he referred to 1 *Saund. Rep.* 243, (n. 4;) *Holt vs. Schofield*, 6 *Term Rep.* 694; *Stark. on Sland.* 293; *Sheely vs. Biggs*, 2 *H. & J.* 364. The words in this case not being actionable *per se*, and inducement was indispensable, and a *colloquium*; but the words must be construed *secundum subjectam materiam*, and their meaning cannot be extended beyond their legal sense, as applied to the occasion on which they were used, and the subject-matter to which they referred. 4 *Coke's Rep.* 20; 1 *Chitty's Plea.* 194; *Stark. on Sland.* 87. If it were otherwise, a demurrer could never be successfully interposed, in an action of slander; because the pleader, in every instance, would give himself a cause of action by the scope of his *innuendo*,

223 although the antecedent matter should disclose no legal * injury. No special damage is averred; and the plaintiff can only recover, if the charge imputes a crime, involving moral turpitude, or for the commission of which, he would be obnoxious to some infamous punishment. *Stark. on Sland.* 19, (note 1;) *Stanfield vs. Boyer*, 6 *H. & J.* 248. The charge, at least, must be of such a scandalous nature, as would necessarily tend to the degradation of the individual in society. *Button vs. Heyward*, 8 *Mod.* 24. He recurred to the count, and stated the averments to be, that some person (other than Johnson, whose name is thereto signed,) wrote the paper hereinbefore set forth, and gave it to defendant's slave, with a view to enable him to escape; that defendant spoke of said paper as a forged instrument; and maliciously charged the plaintiff with having written said paper. There is no averment, that the defendant's

slave did escape; much less, that he escaped by means of said paper. He insisted that the defendant's having called the instrument a forged instrument, was immaterial; unless the false making of such an instrument would amount, in law, to forgery; as where the words used were, "you are a thief;" and it appeared that the words were used in reference to an act, which amounted in law, to a mere trespass, it was decided that the words were not actionable. *Dexter vs. Taber*, 12 *Johns.* 239; 1 *Starkie's Rep.* 67. He also referred, on this point, to 4 *Coke's Rep.* 12, 13. He contended that the paper was not such an instrument, as could be the subject of forgery, either under any Act of Assembly, or at common law. It is not the false making of every writing that will amount to forgery; if it be merely frivolous; of no validity upon its face, nor having the semblance of an effective paper: if it be a writing that could not, if genuine, prejudice another's right, although it be made *malo animo*, the maker, however culpable in morals, is not guilty of the crime of forgery. The counterfeit instrument must be such, that if genuine, it would avail to invest some one with a right, or to divest a right, or to charge some one with a responsibility; it must be such an instrument "as purports on the face of it, to be * good and valid, for the purposes for which it was created." 4 *Com.* 247; 1 *Leach's Cases*, 224 117; (*Sterling's Case*), 2 *East's Pleas*, Cr. 860.

1. It is not a forgery, under any Act of Assembly. It purports to be a certificate of freedom. By the Act of 1805, ch. 66, sec. 3, the counterfeiting a certificate is indictable; but this paper has none of the legal attributes of a certificate of freedom. A valid certificate of freedom can only be given by a county clerk, or a register of wills, under the seals of their respective offices; it must contain a *descriptio personæ* of the party; his height, notable marks, &c. This instrument purports to be given by a private individual; it is not under seal; it contains no description of the person. If genuine, would it be valid as a certificate of freedom? Could the party, who made this paper, be indicted, under this Act, for counterfeiting a certificate of freedom? He could not; because it would be wholly wanting in the requisite formalities. *Wall's Case*, 2 *East*, 953; *S. O.* 2 *Russel*, 349; *Moffat's Case*, 2 *East*, 954; 2 *Russ.* 348. It is not contended, that it would not be forgery, merely because, if genuine, it would be invalid—it is sufficient, if it have the semblance of a genuine instrument. If, for instance, Johnson's name was signed as Register, the paper in so far, would have borne the semblance of a valid certificate, although, in fact, he was not such officer. The objection would have been collateral: not apparent on the face of the instrument. Such was the case of the protection in the name of A. B. as a member of Parliament, when he was not such in fact. *Deakin's Case*, 1 *Sid.* 142. The will of a living person—*Sterling's Case*, 2 *Russ.* 340. The order of a discharged seaman—*McIntosh's Case*, 2 *Russ.* 345. He also referred to cases of unstamped promissory notes,

which cannot be recovered in an action at law, but the false making of which, it is admitted is forgery. *Hawkeswood's Case and Morton's Case*, 2 Russ. 340. But an unstamped paper is not merely void; it may be received in evidence for many collateral purposes. 3 *Starkie's Ev.* 1383. This * paper is within none of these qualifications
225 to the position, first assumed. Again—by the Act of 1796, ch. 67, sec. 19, any person who shall give a pass to another's slave, is indictable. A pass is a license by a master to a slave. This paper does not purport to be signed by a master; nor does it state the bearer to be a slave. The person who falsely made this paper, could no more be indicted under the Act of 1796, for giving a pass to defendant's slave, than he could under the Act of 1805, for counterfeiting a certificate of freedom.

2. At common law the paper has no validity *per se*. If genuine, it could not, *proprio vigore*, destroy Arnold's claim to his slave. If the slave had been apprehended as a runaway, this paper would not have entitled him to his discharge on *habeas corpus*. It may be said, it might have facilitated his escape. This is not a test of forgery; it would be a consequential, and not a direct effect of the paper: the same result might be predicated of any other writing. If the negro did escape, and by means of this paper, then Arnold would have had his special action on the case against the party giving it, not merely for the making such a paper, or for giving it to his slave, but for enticing him to run away. 1796, ch. 67, sec. 19; *Duvall vs. State*, 6 H. & J. 9. If defendant had charged plaintiff with enticing his slave to run away, he would have uttered a slander, because he would have imputed to him an indictable act. But the plaintiff's action in such case, would have been, because of his substantive charge, although the defendant may have referred to the paper as the means used by the plaintiff; and not for a supposed imputation of forgery. He referred to the case of the *People vs. Shall*, 9 Cowen, 778, as strongly in point.

Palmer, for the appellee. 1. Everything which is well pleaded, is admitted by the demurrer. The matters contained in the *colloquium* and *innuendo*, are to be considered together. 1 *Chitty's Plead.* 381;
226 *Hawkes vs. Hawkey*, 8 * *East*, 431; *Roberts vs. Camden*, 9 *Ib.* 93; *Rex vs. Horn*, Cowp. 678, 684; 2 *Saund. Pl. and Ev.* 365. The demurrer admits the forgery of the paper, and that it was intended to work a fraud, these things being charged in the declaration. 2. But the paper *per se*, is the subject of forgery at the common law, as an injury might have resulted from it, which is the true criterion for determining the question of forgery. *Chitty Crim. Law*, 1022. The object and design of the paper, was to facilitate the escape of the slave to whom it was given, and if capable of producing that effect, it is clearly the subject of forgery. *Rex vs. Ward*, 2 L. Ray, 1461; *Chitty Crim. Law*, 1023; *East's Cro. Law*, 862; 2 *Greenleaf*, 365. That the paper was calculated to aid the slave in his escape

he insisted there could be no doubt; and if so, then according to the above authorities, it was manifestly an instrument of which forgery might be committed.

F. A. Schley, on the same side, cited *The King vs. Watson*, 2 Term Rep. 206; *Starkie on Slander*, 54, 55, 290; *Goodrich vs. Woolcot*, 3 Cowen Rep. 239; *Miller vs. Miller*, 8 Johns. 59; *Niven vs. Munn*, 13 Johns. 48; *Gibbs vs. Dewey*, 5 Cowen, 505; 2 *Chitty's Crim. Law*, 1022; *Coogan's Case*, 2 *East's Crim. Law*, 949; *Blackstone*, 4 Com. 247; 1 *Hawk.* 537; *East*, 852, 2 *Chitty Crim. Law*, 1022; *The King vs. Ward*, 2 *L. Ray.* 1461; *Fawcett's Case*, 2 *East's Cro. Law*; 2 *Russell on Crimes*, 349, 350; 2 *L. Ray.* 1466; 2 *East's Crim. Law*, 854, 860, 861, 862; 2 *Strange*, 749; 2 *Chitty's Cro. Law*, 1039; *State vs. Duvall*, 6 *H. & J.* 9; 2 *Chitty's Crim. Law*, 802, 1042; 2 *East's Cro. Law*, 983, 985; 2 *East's Cro. Law*, 953, 954, 983.

Ross, in reply, cited * *Russell on Crimes*, 353; *People vs. Shall*, 9 Cowen, 778.

231

BUCHANAN, C. J., delivered the opinion of the Court. It is unnecessary, and would be a waste of time, to enter upon an enquiry into the grounds of the doubts, that at one time seem to have been entertained, in relation to what instruments were, and what were not, susceptible of the crime of forgery at common law. The difficulties that surrounded the question of forgery or not, have been removed by decisions of acknowledged authority; and it is not now held to be essential to the offence of forgery in any one case, that some one must have been injured. The inquiry is not whether any one has been actually injured, but whether any one might have been prejudiced. In *Ward's Case*, 2d *Ld. Ray.* 1461, which was an information for forging an order to charge certain goods to account, and to appropriate part of the proceeds to the defendant's own use, with intent to defraud, &c.; the subject was fully considered. It did not appear, that the person in whose name the order was drawn, had received any prejudice; but it was held to be immaterial to the offence of forgery, whether any person had been actually prejudiced or not, provided any person might have been injured by it; and that the counterfeiting of any writing, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law—2d *East's Cro. Law*, 854, 860, 161, 862; *Russell on Crimes*, 351, 352. In 2d *Chitty's Crim. Law*, 780, 1022, forgery is defined to be, "The false making, or alteration of such * writings, as either at common law, or by statute, are its objects, with intent to defraud another; "in *Coogan's Case*, 2d *East's Cro. Law*, 853, by Justice Buller, "the making of a false instrument with intent to deceive," and in 2d *East's Cro. Law*, 852, "the false making of any written instrument, for the purpose of fraud, and deceit," as resulting from all the authorities, ancient and modern, taken together *Chitty*, in his treatise on *Criminal Law*, 2d vol. 781, 1022, considers it as set-

232

tled by *Ward's Case*, that "forgery at common law might be committed in respect of any writing whatever, by which another might be defrauded;" and in 781, 1023, speaking of *Ward's Case*, and the case of *Fawcett*, to be found in *2d East's Pls. Cro.* 862, he says: "Every kind of writing seems, on the doctrine of those cases, to be a thing, in respect of which, forgery at common law may be committed." Hence, it would seem to be settled, that the question, whether a particular instrument is capable of supporting a charge for forgery is referable not to the form, but to the substance of it, and to be determined alone by that criterion; the chief ingredients of that offence being fraud, and an intention to deceive; to which the principle on which the case of *The People vs. Shall*, 9 Cowen, 778, cited in behalf of the appellant was decided, is not opposed. The Court there, having gone on the ground that the instrument on the face of the indictment appeared to be one, which, if genuine, would, have been void; and therefore, an instrument, by which no one could have been prejudiced. Applying then as a test, the principle established in the cases of *Ward* and *Fawcett*, and recognized and adopted by the elementary writers to this, and assuming the position laid down in *3d Term Rep.* 176, and *2d Chitty's Crim. Law*, 796, 1036, "that it is not necessary to constitute forgery, that there should be an intent to defraud any particular person, but that a general intent to defraud will suffice;" is the instrument in question, a forgery at common law? which is answered by the solution of another question; could any person have been prejudiced by it? of which there can, we think, be no doubt.

233 * The appellant, who was the owner of the negro man to whom that paper was given, might have been prejudiced by the absconding of his servant, whose escape it might have facilitated. It was calculated to deceive and impose upon most who might see it, and there were few, if any, by whom he was unknown, who would not, on the production of it, have suffered him to proceed. Who can doubt that such a paper, put in the hands of a negro, and purporting to be signed by one or more respectable men known in the community, would be his sufficient passport, by means of which, he would be able to effect his escape from the service of his owner? And Johnson also, whose name is subscribed to that paper, might have been prejudiced; for, if it had been genuine, that is, if he had written it, and given it to the appellant's negro, who had thereby effected his escape, it is perfectly clear, that he would not only have been liable to an action for damages by the owner, but also to a criminal prosecution under the Act of 1796, ch. 67, sec. 19, according to the case of *Duvall vs. The State*, 6 H. & J. 9; which Act provides against the depriving an owner of the services of his slave by any unlawful means; which the furnishing a slave with such a paper, by means whereof he escaped from the service of his owner, would be. "The false making," therefore, of that instrument, by which John-

son and the appellant might have been so injured, was a forgery at common law, for which the defendant, if guilty, would have been punishable by indictment, though it does not appear, that any body was actually injured thereby, which is not necessary to constitute forgery; and it is not like the case of a mere cheat, to constitute which, there must be a prejudice received: hence it follows, if this concise view of the subject be correct, that the words spoken by the appellant, as laid in the declaration, charging the defendant in error with having forged that instrument, are actionable, and that the demurrer was properly overruled.

Judgment affirmed.

* TRASHER, Garnishee of SHAWEN *vs.* EVERHART, *a. d. b.* 234
n. of WALTMAN.—December, 1831.

In attachment causes, as against the garnishee, according to our practice, the short note filed at the time of issuing the attachment, is substituted for a declaration. (a)

It is in general true, that foreign laws are facts which are to be found by the jury; but this rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the Court to determine, whether a written instrument is evidence. In such case, the evidence always goes in the first instance, to the Court, which, if the evidence be clear and uncontradicted, may, and ought to decide, what the foreign law is, and act accordingly. (b)

If what the foreign law is, be matter of doubt, the Court may decline deciding it, and may inform the jury, that if they believe the foreign law attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence, if not, they should reject it. (c)

(a) Approved in *Spear vs. Griffin*, 23 Md. 429.

(b) Cited in *Gardner vs. Lewis*, 7 Gill, 394; *Wilson vs. Carson*, 12 Md. 75; *Cecil Bank vs. Barry*, 20 Md. 294. See *De Sobry vs. De Laistre*, 2 H. & J. 165, *note*; Rev. Code, Art. 70, sec. 45. Although the *factum* of a foreign law is for the jury to find, upon the evidence, yet it is the duty of the Court to construe it, especially if it be in writing, and to direct the jury as to its force and effect. *Cecil Bank vs. Barry*, *supra*. The testimony of two witnesses, (lawyers,) that they are of opinion a certain deed is, according to the laws of Kentucky where it was executed, legal and sufficient to convey the property to the grantee, and that they know of no statute of that State affecting this opinion, is sufficient proof of the foreign law, and this being the only testimony on the point in the case, and the question being whether the deed should be admitted in evidence, the proof is for the Court. *Wilson vs. Carson*, *supra*.

(c) Cited in *Dement vs. Stonestreet*, 1 Md. 123; *Funk vs. Kincaid*, 5 Md. 418; *Barry vs. Hoffman*, 6 Md. 87; *Haney vs. Marshall*, 9 Md. 212; *Andre vs. Bodman*, 13 Md. 251; *Spencer vs. Trafford*, 42 Md. 18. Distinguished in *Nicholson vs. State*, 38 Md. 157. When a written instrument is offered as evidence and objected to, its execution is to be shown to the Court, by *prima facie* proof at least, and when that is done it is permitted to go to the jury. But if the preliminary proof is doubtful, the Court may allow the jury to take the

In an attachment cause, upon a short note in assumpsit, the plaintiff proved a single bill of the debtor, as his cause of action, and proposed to prove to the jury, that the instrument of writing in question, was executed in Virginia, for the purpose of showing, that by the laws of that State, a single bill is not a specialty. The County Court permitted the evidence to go to the jury. *Held*, upon appeal that the evidence was for the Court exclusively.

It is an universal principle, governing the tribunals of all civilized nations, that the *lex loci contractus* controls the nature, construction, and validity of the contract. The exceptions are, where it would be dangerous, against public policy, or of immoral tendency, to enforce that construction here. (d)

The *lex loci contractus*, is never looked to, to determine the remedy which should be used, and the process to be issued, to enforce a contract. These are determined by the *lex fori*. So an action of assumpsit cannot be maintained here, upon a single bill made in Virginia, which, according to the laws of that State, is not a specialty, but according to our law, is. (e)

From the earliest period of our judicial history, a scrawl has been considered as a seal. It is not necessary that it should be adopted by the obligor, by a declaration in the body of the bond or single bill, to make it his seal. It is sufficient, if the scrawl be affixed to the bond or bill, at the time of its execution or delivery; and that is presumed, (in the absence of other proof,) from the fact that the obligee is in possession of an instrument, with a scrawl attached to it. (f)

instrument with the proof in regard to its execution, informing them that they are to receive it as evidence, if they believe it to have been executed, otherwise they must not consider it as evidence. *Haney vs. Marshall*. When the preliminary proof is clear and uncontradicted, the Court will decide the question of admissibility, but if doubtful it is proper to submit the matter to the jury and let them decide the doubt, when such doubt depends upon a question of fact. But every slight degree of doubt created by preliminary proof, or other proof in the cause upon which the question of admissibility may depend, will not require the Court to decline deciding the question and to leave the doubt to be settled by the jury. *Funk vs. Kincaid*. When the Court is in doubt as to the competency of a witness, the question may be referred to the jury. *Spencer vs. Trafford*.

(d) Affirmed in *R. R. Co. vs. Glenn*, 28 Md. 321. See *Pritchard vs. Norton*, 106 U. S. 124; *Harper vs. Hampton*, 1 H. & J. 375, note (a), 377, note (b); *De Sobry vs. De Laistre*, 2 H. & J. 167, note.

(e) Approved in *Bank vs. Donnally*, 8 Peters. 378; *Le Roy vs. Beard*, 8 Howard, 465; *Pritchard vs. Norton*, 106 U. S. 133.

(f) In *Jackson vs. Myers*, 43 Md. 452, where it was held that the printed representation of a corporate seal on the promissory note of a Building Association, negotiable in form, did not change such note into a specialty. the Court said: "The authorities mainly relied on by the appellees in support of the position that because there is a seal, or the representation of a seal, on the note, therefore the note must be a specialty, on the cases of *Trasher vs. Everhart*; *Stabler vs. Cowman*, 7 G. & J. 284, and *Gist vs. Drakely*, 2 Gill. 330. The first two of these cases presented no question as to what constituted, or as to the effect of printing a representation of a corporate seal on an instrument executed by a corporation: but were cases where the instruments involved were executed by individuals, using the scrawl at the end

APPEAL from Frederick County Court. On the 18th of March, 1828, the appellee, Joseph Everhart, as administrator *d. b. n.* with the will annexed, of Jacob Waltman, obtained a warrant for an attachment, against the * lands and tenements, goods and chattels, of David Shawen and George W. Shawen, and at the 235 time of filing the same, exhibited the following short note: "Action of assumpsit in Frederick County Court. The plaintiff's cause of action in this case, arises upon a joint promissory note, bearing date the seventeenth day of September, in the year 1822, whereby, two years after date, the defendant promised to pay to the said Jacob Waltman, in his life-time, or order, the just and full sum of \$372, with interest thereon from the date hereof, for value received; which said sum, with the interest thereon accrued, is still unpaid and unsatisfied, except in so far as the same is credited, and to recover the balance, whereof amounting to the sum of \$338.82, this suit is brought," &c. Upon the return of the attachment, the appellant, Archibald Trasher, appeared as garnishee, and pleaded *non assumpsit*, and that the property levied on belonged to him, and not to the said David and George W. Shawen. Issues were taken to these pleas.

1. At the trial the plaintiff offered to read in evidence to the jury the following instrument of writing, being the same on which the present proceeding is founded. "\$372. Two years after date, with interest from this date, we promise to pay to Jacob Waltman, or order, the just and full sum of three hundred and seventy-two dollars, for value of him received, this 17th day of September, 1822; David Shawen, (sl.) George W. Shawen, (sl.)" The admissibility of which, being objected to by the defendant, upon the ground that it was a single bill, and not the foundation of an action of assumpsit, the plaintiff then offered to prove to the jury, by a competent witness, that the instrument of writing in question was executed in Virginia for the purpose of showing that by the laws of that State the said instrument is a promissory note, and not a single bill; the defendant thereupon objected that the said evidence was not proper for the jury, but should be directed to the Court. This last objection was overruled, and the evidence submitted to the jury; the defendant excepted.

* After having proved that said instrument was executed 236 in Virginia, and it having been admitted, that by the laws of that State it would there be considered and treated as a promissory note; the defendant objected, that in Maryland it was not evidence in an action of assumpsit, but the Court overruled the objection, and

of their names as seals. The law settled by those cases we in no manner design to disturb." See *Muth vs. Dolfield*, 43 Md. 466, to the same effect. As to the adoption of a seal by a party executing an instrument, see *State vs. Humbird*, 54 Md. 327.

permitted the instrument to be read to the jury. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The case was argued before STEPHEN, ARCHER, and DORSEY, JJ.

Palmer, for the appellant, contended, in this case three questions are presented for the consideration of the Court. 1. In this State, a scrawl, or a mark made with a pen, in the form of a seal, is *per se*, a seal, and that it is not necessary to be expressed in the body of the instrument, that it was the intention of the parties to give it the effect of a seal. This question depends upon a uniform practice and usage in this State, sanctioned by our Courts, and acquiesced in by all classes of the community, from the earliest history of the State. It has always been considered by the profession in Maryland, that a scrawl with a pen of L. S. at the end of the name, is a seal, and to have the same effect as wax. It has become the common law of the State, and to disturb a practice and usage so uniform, and of such long duration, would, in all probability, be productive of great mischief, by affecting titles, and destroying vested rights. It is admitted, that a scrawl with a pen, would not, in England, constitute a seal, and would not be noticed as such, even if it were expressed in the body of the instrument, that the parties intended it as such. In England, "a seal is wax, with an impression." *Coke*, 3 *Inst.* 169; *Perkins*, *sec.* 134; 2 *Leon.* 21. Before the conquest, the English did not seal with wax, but they usually made a cross of gold on the parchment, and sometimes an impression on a piece of lead. *Jac.*

237 *Law Dic. Seal.* In the time of Wm. I, the *king and the nobility used seals of arms, which were afterwards followed by the gentry; and in the reign of Edw. III, seals with devices, became common with all sorts of persons. 2 *Nelson*, 207. It would seem to follow, that "wax with an impression," was not used anciently in England, but that usage and custom, of later years, have made wax necessary for a seal. Wax, in England, is *per se*, a seal, and requires no expression in the body of the instrument, to show that the parties intended it as such. This case must be decided either according to the common law of England, or the usage, or common law of this State. If the former is to govern, the scrawl cannot be noticed as a seal, nor considered as such, as wax is necessary to constitute a seal; and the expression in the body of the instrument, showing the intention of the parties, could make no difference. It is not the expression in the body of the instrument that constitutes the scrawl a seal, but it is the scrawl itself, being substituted for wax, by usage and practice in this State. The decisions of our sister States upon a question like the one before us, can have no influence upon the Court. The different States have decided the question according to their local law and customs. New York is the only State, it is be-

lieved, that has adhered to the common law—wafer or wax is required in that State. *Warren vs. Lynch*, 5 *Johns.* 240. In Pennsylvania, a scrawl with a pen is *per se*, a seal, and requires no expression in the body of the instrument to shew the meaning of the parties. *Taylor vs. Glaser*, 2 *Serg. & Rawl.* 504; *Long vs. Ramsay*, 1 *Serg. & Rawl.* 72; *McDill vs. McDill*, 1 *Dall.* 63. In Virginia, to constitute a scrawl a seal, an expression in the body of the instrument is necessary, to shew the intention of the parties. *Jones vs. Temple and Logwood*, 1 *Wash. Va.* 42; *Blair vs. Blairgrove*, *Ib.* 170; *Austin, Ex'r vs. Whitlock, Ex'r*, 1 *Mun.* 487; *Anderson vs. Bullock et al.* 4 *Ib.* 442. In New Jersey, a written scrawl is not good as a seal, except upon instruments for the payment of money. 1 *Hals.* 169; *Sou.* 449. In S. Carolina, wafer or wax is not necessary to make a seal, but a scrawl with a pen, including L. S. in the handwriting of the obligor, is a seal. *Ralph & Co. vs. Gist*, 4 *McCord*, 267; *U. States vs. Coffin, Bee*, 140.

2. When a question occurs before a Court of law, whether certain evidence be competent or not, the determination of which depends upon certain preliminary facts, those facts must be decided by the Court, and the evidence of such preliminary facts are not admissible and proper to go to the jury. *Claytor vs. Anthony*, 6 *Ran.* 285; *Jackson vs. Frier*, 16 *Johns.* 193; 2 *Philips' Ev.* 88.

3. An action of assumpsit cannot be sustained in this State upon a sealed note, or specialty, executed in the State of Virginia; although an action of assumpsit would be the proper form of action in that State; debt is the proper form * of action here. The law of the place where a contract is made, or to be performed, **239** is to govern as to the nature, validity, construction, and effect of such contract: but the remedy, or the manner of enforcing such contract, is to be governed by the *lex fori*. The rights of the parties, and remedy, have frequently been confounded, and the profession has found great difficulty in running a practical line between cases of the *lex loci contractus* and the *lex fori*. But it is now clearly settled, that the form of the action, the pleadings, and all judicial proceedings, in relation to contracts, are to be governed by the *lex fori*. If the remedy was to be governed by the law of the place where the contract was made, it would be difficult for counsel to know what form of action to bring upon foreign contracts; and, in truth, they could not institute suit with safety, until they took time to ascertain the mode of judicial proceeding, of the State or country where the contract in question was made. This would lead to endless difficulty and delay, and in many instances, impede the creditor from a speedy action, to the loss of his claim. The principles contended for in this case, are fully sustained by the highest judicial tribunals in this country and England. *Andrews and Jerome vs. Herriot*, 4 *Cowen*, 508; *Decouche vs. Savetier*, 3 *Johns. Chan.* 202; *Whitemore vs. Adams*, 2 *Cowen*, 626; *De Sobry vs. De Laistre*, 2 *H. & J.* 228; *Dixon vs.*

Ramsay, 3 *Cranch*, 323; *Sicard vs. Whale*, 11 *Johns.* 194; *Pearsall et al. vs. Dwight et al.* 2 *Mass.* 89; *Nash vs. Tupper*, 1 *Caine*, 402; *Duplein vs. De Roven*, 2 *Vern.* 540; 3 *Esp. (note,)* 164. The dispute in this case is, whether the action shall be debt or assumpsit upon the contract in question. As to the form of action, the Court cannot look beyond the contract itself. The right of the parties and the effect of the recovery, will be the same in either form of action. *Andrews vs. Herriot*, 4 *Cow. Rep.* 510. The only case to be found, which teaches a different doctrine, is the case of *Meredith vs. Hinsdale*, 2 *Cain's * Rep.* 362, which was much shaken by the decision of *Warren vs. Lynch*, 5 *Johns. Rep.* 237, and expressly overruled by the case of *Andrews vs. Herriot*; *Adams vs. Kerr*, 1 *Bos. & Pull.* 360; *Lodge vs. Phelps*, 1 *Johns. Cases*, 139; 2 *Cain's Cas. Error*, 321; *Milne vs. Graham*, 1 *Barn. and Cresw.* 192. The cases which have been decided upon this subject, are decisive of the question under consideration; they all clearly go to show that the form of the action, and the pleadings in the cause, must be governed by the *lex fori* and not the *lex loci*. *Tappan vs. Poor*, 15 *Mass.* 419; *Ruggles vs. Keeler*, 3 *Johns.* 263; *Harper vs. Hampton*, 1 *H. & J.* 453; *Ib.* 612; *Graves vs. Graves*, 2 *Bibb Rep.* 207; *LeRoy vs. Crowninshield*, *Mason*, 151.

W. Schley, for the appellee. 1. The evidence of what was the law of Virginia, the place where the note was made, was properly submitted to the jury. *De Sobry vs. De Laistre*, 2 *H. & J.* 229. But if the evidence on that subject should have been addressed to the Court, the allowing it to go to the jury is not the ground for the reversal of the judgment. *Jackson vs. Frier*, 16 *Johns.* 196. If the evidence was adequate to establish the fact, the party is not prejudiced, and has, therefore, no right to complain. It was proved, or admitted, that according to * the laws of Virginia, the instrument sued on was a promissory note, and the question upon this exception is, could it be offered in evidence, to support the issue on the part of the plaintiff. 2. It has never been decided in Maryland, that a mere scrawl, affixed to the signature, *per se*, constituted what would otherwise be a note, a bill obligatory. There must be some expression in the body of the paper, showing that the party adopts it as his seal. In England, there must be an impression on wax; and the same is the law in all the States north of New Jersey. 4 *Kent's Com.* 444. The early practice in Maryland was in conformity with the common law of England; and the custom of adopting the scrawl being in derogation of that common law, should not be enlarged. If the mere scrawl makes an instrument a specialty, then a party who holds a note barred by limitations, or wishing to exclude inquiry into its consideration, may easily effect his purpose, by affixing one to the signature. 3. But in this case, it is immaterial what the rule upon this subject may be,—the instrument, by the *lex loci contractus* is a promissory note; it is then a promissory note here, and the remedy

adopted, for the recovery of such a claim, in our Courts, is that, which has been adopted in this case. Considering this a note, the *lex fori* prescribes the action of assumpsit, for the enforcement of the obligation which it creates. If, by the law of Virginia, covenant was the proper form of action on a promissory note, would it be contended that if a suit was brought in Maryland, on a note made in the former State, that that form of action should be pursued. Where no place of performance is specified in the contract, the legal presumption is, it was intended to be performed at the place where it was made. *De Sobry vs. De Laistre*, 2 H. & J. 219. Now, as in the note in question, no place of performance is designated, the parties are to be presumed to have contemplated its performance in Virginia. It was there made, and intended to be treated, as a simple contract. The obligation of such a contract was designed to be created, and none other. Its consideration, according * to the views of the parties, was to be open to examination; 242 and yet it is contended, that by resorting to the Courts of a different jurisdiction, you exalt this simple contract, into a specialty, and thereby exclude any such inquiry. On this point, he cited *De Wolf vs. Johnson*, 10 Wheat. 367; *Harrison vs. Sterry*, 5 Cranch, 298; *Camfranke vs. Burnell*, 1 Wash. C. C. 340; *Willing and Francis vs. Consequa*, 1 Peters' C. C. 301; *Andrews vs. Herriott*, 4 Cowen, 511, (note;) *Meredith vs. Hinsdale*, 2 Caines, 362.

ARCHER, J., delivered the opinion of the Court. This was an attachment issued at the suit of the plaintiff, to affect the goods of the defendant, for the purpose of satisfying a debt, alleged to be due from the defendant to the plaintiff. The short note, which accompanied the *capias*, stated the cause of action to be a joint promissory note of the defendants, given to the testator of the plaintiff. The substance of the short note is referred to, because, according to our practice, it is substituted in this kind of proceeding for the declaration, and because the questions in this cause, grow out of the form which the short note has assumed. The garnishee appeared, and pleaded *non assumpsit*, and property in himself to the goods attached, and issues having been joined, and the Court having refused permission to the plaintiff to read in evidence the cause of action, upon the ground that the same was a specialty, and not a promissory note, he then offered in evidence to the jury, that the cause of action was executed in Virginia, for the purpose of showing, that by the laws of that State, it was a promissory note, and not a single bill. It is contended, that in the admission of this evidence to the jury, the Court committed an error, and that it was evidence for the Court, and not for the jury. It is, in general, true, that foreign laws are facts which are to be found by the jury; but this general rule is not applicable to a case, in which the foreign laws are introduced for the purpose of enabling the Court to determine whether a written in-

243 strument is evidence. In such case, * the evidence always goes in the first instance to the Court, which, if the evidence be clear and uncontradicted, may, and ought to decide what the foreign law is, and according to its determination on that subject, admit or reject the instrument of writing as evidence to the jury. It is offered to the Court to determine a question of law—the admissibility or inadmissibility of certain evidence to the jury. It is true, if what the foreign law is, be a matter of doubt, the Court may decline deciding it, and may inform the jury, that if they believe the foreign law, attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence: on the contrary, if they should believe that such is not the foreign law, they should reject the instrument as evidence. We collect from the bill of exceptions, that the object of the plaintiff in introducing this evidence of the laws of Virginia, was to let the instrument of writing, which was the cause of action, in, as evidence to the jury. He could have had no other object. This being the case, it was evidence for the Court, and not the jury, unless the Court had thought proper, in case of doubt about the evidence, to have ultimately submitted it to the jury: and that is like a case of very common occurrence in trials at *nisi prius*, where a deed is produced, and evidence of its execution is adduced, in order to let it go to the jury; such evidence is always addressed to the Court, and they determine its admissibility upon such evidence, unless in cases where the evidence of its execution is doubtful, in which case the Court will let the deed go to the jury with the evidence offered of its execution, informing them that they are to receive it in evidence, if they shall believe it to have been executed, but if they should believe it was not executed, they must reject it; or, in other words, not consider it as evidence in the cause. And in all cases of the like character, the evidence is for the Court in the first instance; the object being to ascertain whether certain testimony offered is, in point of law, competent and proper for the consideration of the jury. But it may be asked upon another ground, * whether the Court were right in permitting the evidence of **244** the law of Virginia upon this subject, to go the jury, as the history of the cause shows it was offered to let in the instrument of writing as evidence. Was it material to the determination of that question? This question must be answered by the decision of another; whether the foreign law, or the domestic law, should, in this proceeding, regulate and fix the character of the instrument. This subject will be reviewed and examined, in the consideration of the second bill of exceptions.

In the second bill of exceptions, the Court permitted the plaintiff to read in evidence to the jury, the cause of action, having first proved its execution, it being admitted that it was, by the laws of Virginia, where it was executed, a promissory note. The plaintiff's counsel in support of the opinion of the Court, as expressed in this

bill of exceptions, endeavors to sustain his case, by the maintenance of one or the other of the following propositions.

1st. That the evidence was admissible, because being executed in Virginia, it was a promissory note there; and that the law will so treat it here.

2d. That if wrong in this, it is by the laws of this State a promissory note, and ought to have been received to sustain the issue.

As to the first proposition, its truth depends on this; whether the *lex loci contractus*, or the *lex fori*, is to govern? It is a universal principle, governing the judicial tribunals of all civilized nations, (for the truth of which no authority need be cited,) that the *lex loci contractus* controls the nature, construction, and validity of the contract. Courts will always look to the *lex loci*, to give construction to an instrument, and will impart to it validity, according to those laws, unless it would be dangerous, against public policy, or of immoral tendency to enforce it here. They will also look to those laws, to ascertain the nature and true character of the contract, that efficacy may be given to its obligations between the parties, but they never look to the *lex * loci* to determine the remedy which should be used, and the process issued to enforce its obligations: these **245** are always determined by the *lex fori*. The law demands that a discrimination should be made between the rights and the remedy. In the ascertainment of the former, the *lex loci* becomes the rule; the latter is controlled by the *lex fori*. It must be always immaterial to the creditor, in what manner his claim is enforced, whether as a simple contract, or as a specialty, so that his essential rights are protected in the one form of action, as well as in the other. As in the present case, in what manner are the rights created, and obligations incurred, affected by treating the instrument as a single bill; although, according to the law of the place, it is a promissory note? In an action of debt, its obligations are held equally sacred, and in the same manner enforced, as if the action had been assumpsit. If there were no other reason for the rejection of the doctrine contended for, it might be sufficient to say, that it would be a great inconvenience to fashion the remedy according to the character of the contract impressed upon it, in the country where it is made, or to be performed. Inquiries would, in all cases, have to be instituted, before a suit could be commenced, into foreign laws, to determine the nature of the remedy to be pursued, which, in many cases where evidence was not at hand, might be attended with great delay and difficulty, and consequent loss of the debt. These views are opposed by the case of *Meredith vs. Hinsdale*, 2 *Caine*, 362, in which the Court adjudged, that an instrument being a specialty by the laws of Pennsylvania, although it was not such by the laws of New York, yet that it ought to be received as a sealed instrument, and that an action of debt would lie upon it. But this determination has been expressly overruled in *Andrews and Jerome vs. Herriott*, 4 *Cowen*, 508, in which

the Court says, that *Meredith vs. Hinsdale*, was decided without attention to the distinction, that the *lex loci contractus* governs only as to the construction of the contract, and has nothing to do with the remedy, which * is controlled by the *lex fori*. The dispute is
246 merely upon the remedy; that is to say, whether the action shall be covenant, or assumpsit, upon a given contract between two persons within the jurisdiction of the Court. The substance and effect of the recovery, is the same in either form, and they say, they cannot sanction the case of *Meredith vs. Hinsdale*, without overturning the entire class of cases which distinguishes between the *lex loci* and *lex fori*. According to these views, the character of the instrument must be regulated by a reference to our domestic law. But conceding that the first proposition cannot be sustained, it is contended that the instrument of writing is not a specialty, but a promissory note, by the laws of this State, and that the Court therefore correctly permitted it to be given in evidence, under the issue of *non assumpsit*.

From the earliest period of our judicial history, a scrawl has been considered as a seal, and it would be too late at this day, and would be attended with consequences too serious, to permit it to be questioned. It is not necessary, as has been argued, that the scrawl must be adopted by the obligor, by a declaration in the body of the bond, or single bill, to make it his seal. It is sufficient if the scrawl be affixed to the bond, or bill, at the time of its execution and delivery. For, if he execute and deliver it with the scrawl attached, it being considered here as equivalent to the wax or wafer, it is as much his seal, as if he had declared it to be so in the body of the instrument. The fact of the clause of attestation not appearing in the usual form of "signed, sealed and delivered," can, in reason, make no difference: for the question always is, is this the seal of the obligor? and if he has delivered it, with the scrawl attached, it is his seal, and must be so considered: for whether an instrument be a specialty, must always be determined by the fact, whether the party affixed a seal; not upon the assertion of the obligor, in the body of the instrument, or by the form of the attestation. In this case, the execution of the bill is admitted, and the plaintiff has possession of it which is * evidence of delivery; and there is nothing
247 to show that the scrawl was not attached, when it was executed and delivered, and the presumption always would be, that the seal was affixed to the instrument on its delivery, in the absence of evidence to the contrary.

Judgment reversed.

BELT, use of BOSWELL *et al.* vs. WORTHINGTON *et al.*—December, 1831.

Where a replevin had been struck off upon the motion of the plaintiff, and an action upon the replevin bond had been instituted, the defendants, (the plaintiff in replevin and his securities) suffered judgment to go by default; they were, notwithstanding, permitted, upon the execution of a writ of inquiry, to assess the plaintiff's damages, to show they had title to the articles replevied, in mitigation of damages. (a)

The object of the law in prescribing that a replevin bond should be entered into by a plaintiff before he should have the writ, was only to indemnify the defendant. The action upon that bond being *sui generis*, ought to be so moulded as best to subserve the principles of justice, having a regard to the rights decided in the replevin, and the nature and character of the bond. (b)

APPEAL from Prince George's County Court. This was an action of debt, commenced the 25th November, 1828, by the appellant, Edward W. Belt, against the appellees, on a replevin bond, dated July 16th, 1828. To the plea of general performance, the plaintiff replied: that the defendants, on the day of the execution of the bond, prosecuted and sued forth, out of the County Court, the writ of replevin, to an *elisor* of the county (appointed in that behalf) directed, commanding him to replevy and deliver to the defendant, thirty thousand pounds of tobacco, which the said Edward W. Belt, of the county aforesaid, sheriff, had taken, and unjustly detained, &c. That the said *elisor*, as by the writ commanded, did replevy, and deliver to the defendants, the said tobacco; and that at the return term of the same, the parties appeared, when the attorney of the * defendants, then and there dismissed, discontinued, and 248 struck off their writ and suit aforesaid; and so the plaintiff says, that the defendants have not well and faithfully performed the condition of the said bond, &c. The defendants suffered a judgment to go against them by default to this replication; and upon the execution of a writ of inquiry at bar, to assess the plaintiff's damages, a record of the proceedings in the replevin suit referred to in the replication, was read in evidence by the plaintiff, showing that the same was stricken off upon the motion of the defendants' attorney. The

(a) Cited in *Green vs. Hamilton*, 16 Md. 380. In an action on a replevin bond, the judgment in the replevin suit in which said bond was given, does not conclude the obligors in the bond from proving by the proceedings in the cause, or *aliunde*, the character of the possessory right, upon which the plaintiff in the action on the bond recovered in the replevin suit. *Mason vs. Sumner*, 22 Md. 312. See Rev. Code, Art. 64, sec. 126; *Walter vs. Warfield*, 2 Gill, 216; *Seldner vs. Smith*, 40 Md. 602.

(b) Approved in *Glenn vs. Fowler*, 8 G. & J. 348; *Mason vs. Sumner*, 22 Md. 319; *Seldner vs. Smith*, 40 Md. 614.

plaintiff also, by consent of parties, read to the jury the schedule and appraisement, returned by the *elisor*, who executed the replevin, as evidence of the quantity and value of the tobacco replevied. The defendants then offered to prove, in mitigation of damages, that at the time of the issuing out of the said writ of replevin, they had a good title to the tobacco. The plaintiff objected to the competency of this evidence, upon the ground—1st. that the effect of admitting it, would be to try the question of title, in a collateral manner; and, 2d, that the defendants having permitted a judgment to go against them by default, in the present action, were thereby concluded, from going into such an enquiry. But the Court [STEPHEN, C. J. and KEY, A. J.] overruled the objections, and permitted the evidence to go to the jury. The plaintiff excepted, and the verdict being but for nominal damages, he brought the present appeal.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Alexander, for appellant.

251 * *Johnson*, for the appellees. The question to be discussed is, is a plaintiff in replevin, who fails to prosecute his suit with effect, liable for the whole amount of the property in controversy? The object of the replevin bond is to put the defendant in the situation he would have stood in, if no suit had been brought, or in other words, to indemnify him against the consequences of the suit. Suppose there had been a *retorno habendo* awarded the defendant in replevin, and the plaintiff had subsequently *non-prossed* his action; will it be pretended, that in an action on the replevin bond, the defendant in the last action could not give in evidence those facts, for the purpose of protecting himself against a judgment for the full value of the property? the only effect of suffering a default, in an action on the bond, is to admit, that plaintiff had a right to sue upon it: it admits the right of possession in the property replevied. to have been in the present plaintiff, and no more. Suppose the owner of a slave hires him to a third person for a certain period, and within the period replevies him, and afterwards non-suits his action; will it be said, that in an action on the replevin bond by the hirer, the owner could not prove title, to prevent a recovery against him for the full value of the slave; if he could not, then the replevin bond, instead of being a mere indemnity, would place the hirer in a better condition than if no suit had been brought; he would recover the full value of the negro, when he had but a temporary right to his services. The effect of a judgment by confession, or *nil dicit*, in an action upon a bond with a collateral condition, is not to entitle the party to the amount of the penalty, but only to the damages **252** * actually sustained; and any evidence showing or limiting the extent of the damages, is proper for the jury. The proof in this

case, was not to defeat the action, but simply to mitigate the damages. He referred to 6 H. & J. 469.

ARCHER, J. delivered the opinion of the Court. The judgment by default in the replevin bond against the defendant, only admits, that he did not prosecute his writ of replevin with effect; and it is incumbent on the plaintiff in the action, to show the damage which he has sustained by the failure to prosecute. For this purpose, he has offered in evidence, the proceedings in replevin, in which the bond was taken, by which it appears that the replevin was executed, and the goods delivered to the defendants, and that instead of prosecuting the writ with effect, the suit was, by their order, stricken off. Upon the execution of the writ of inquiry, the plaintiffs sought to recover the value of the goods, which, from the proceedings, appear to have been delivered to the defendants, and not returned; and in mitigation of the damages, the defendants offered evidence to show title in them, to the goods, at the time of the replevin sued out. Its admissibility has been questioned, which forms the subject for our consideration. If the judgment of non-suit, which followed, or ought to have followed, the order to strike off the suit in replevin, had been conclusive of the rights of the parties to the property in controversy, the evidence would have been clearly inadmissible. But we apprehend, that no right has been settled between the parties to the suit, which should induce the rejection of the evidence. The right to have the return of the goods, is the only consequence of the judgment. The title to the goods is in no manner settled by it, and the defendant could not, therefore, be estopped by the proceedings, from an effort to mitigate the damages, by setting up a title to the goods. The object of the law in prescribing that a replevin bond shall be entered into by a plaintiff, before he should have * the benefit of the writ, was only to give indemnity to the defendant. If, in truth, he had 253 no right to the property, at the time of the institution of the suit, the rejection of the evidence, by putting it in his power, to recover the value of the goods, would enable him to overreach a just measure of indemnity, and inflict upon the plaintiff a penalty which the law never contemplated. No argument can be deduced against the admissibility of this evidence, from the principles applicable to recoveries on appeal bonds, taken from actions on money contracts, where the judgments, by default, are as conclusive as upon verdicts; because, in the proceedings in the replevin suit, which gave rise to this replevin bond, nothing has been done which is at all conclusive upon the parties, with regard to title; and the action of replevin, being an action *sui generis*, the recovery on the replevin bond, ought to be moulded in such a manner as will best subserve the principles of justice. Whether such evidence would have been admissible, had the pleadings in the action of replevin assumed

other forms, it is not proper now to determine. We may be permitted, however, to say, that the question must always be regulated by a reference to the rights decided in the action, and the nature and character of the bond.

Judgment affirmed.

YATES AND MCINTYRE *vs.* O'NEALE AND SMITH.—December, 1831.

The Act of 1821, ch. 232, was not designed to prevent the mere sale of lottery tickets, or to impose upon the seller the necessity of obtaining a license therefor. Its prohibitions only extend to the opening, setting up, exercising, or keeping any office or other place, for selling lottery tickets, or registering the numbers, or publishing the setting up, &c. without having first obtained a license for that purpose.

A contract between A. and B. by which the latter agreed to become the agent of the former, for the sale of lottery tickets, account for, and remit a

254 * certain part of the sales of tickets, return unsold tickets, and bear the expenses of the agency, is not void under the Act of 1821. There is nothing in such a contract, upon any principle of construction applicable to penal statutes, that could warrant a jury in inferring that the agent had agreed to open an office, &c. of the character described in the Act; and the Court will not presume that A. intended to violate that law, by having an office kept without a license.

APPEAL from Frederick County Court. This was an action of assumpsit, instituted by the present appellants, against the appellees, on the 31st of July, 1826, upon the following written contracts: "Know all men by these presents, that we, H. G. O'Neale and Jonas Smith, are held and firmly bound unto John B. Yates and Archibald McIntyre, in the penal sum of \$1,000, to be paid to the said Yates and McIntyre, or either of them, or their certain attorney, heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, &c. Witness our hands and seals, this 24th day of June, 1824. Whereas, the above bounden H. G. O'Neale has undertaken, as agent for the above named Yates and McIntyre, to vend lottery tickets, for which he is to receive a certain allowance, as agreed upon between them and the said above bounden H. G. O'Neale; and has also agreed to make due returns of such money as he shall receive for said tickets, and sell them at such prices as he may from time to time be directed by them, or their agent residing in Baltimore: now therefore, the condition of the above obligation is such, that if the above named H. G. O'Neale shall well and faithfully perform his duty, as agent aforesaid, pursuant to the instructions he shall from time to time receive, and duly return all the money which he shall receive for lottery tickets, or shares, as soon as received by him, then this obligation to be void, or else to remain in full force. H. G. O'Neale, Jonas Smith."

"Memorandum of agreement between H. G. O'Neale and John B. Yates, and Archibald McIntyre, by S. Scribner, their agent, made

this 24th of June, 1824. The said H. G. O'Neale agrees to sell lottery tickets for said Yates and * McIntyre, for cash only, and return to their agent in Baltimore all such money, as he shall, 255
from time to time receive for them, by mail, unless otherwise directed. And he also agrees to return to the office in Baltimore, by mail, if not otherwise directed, all such tickets as shall remain unsold at such time previous to the drawing, as he shall be directed by the said Yates and McIntyre, or their agent residing in Baltimore. And the said Yates and McIntyre agree to allow the said H. G. O'Neale, for all the tickets he shall so sell and remit, the money for one-half the advance price for which they shall sell, over and above the scheme price of the tickets; the business of the agency, and the expenses thereof, to be borne by the said H. G. O'Neale, except the postage, which is to be charged equally to both the parties. H. G. O'Neale. S. Scribner, agent for Yates and McIntyre."

It was admitted that the defendant, H. G. O'Neale, as agent of the plaintiffs, after the execution of the said instrument of writing, received from the plaintiffs sundry lottery tickets, and shares of lottery tickets, in a certain lottery thereafter to be drawn, and which lottery was authorized by an Act of Assembly of this State, and that he vended and disposed of said tickets, as such agent, in the Town of Middletown, in Frederick County, and received from the vendees respectively, the prices thereof; and that on the 23d of September, in the year 1825, he was in arrears in the sum of \$398.25, for money by him previously received, for tickets by him previously sold, as such agent, and for which he had not returned the money to the plaintiffs, or their agent, or in any way paid, or accounted for the same. The plaintiffs also proved, by a competent witness, that afterwards, and after the determination of such agency, the defendants acknowledged that the said sum was in arrear as aforesaid, and promised to pay the same within two weeks thereafter, and that the same money and every part thereof, is yet unpaid. The plaintiffs here rested their case. The defendants then prayed the Court to instruct the jury, that the plaintiffs are not entitled to recover in *this cause from the evidence offered; because the contract 256
on which the suit is brought, is void, by virtue of an Act of Assembly of this State, passed at December Session, 1821, ch. 232, which instruction the Court [SHRIVER, and TH. BUCHANAN, A. J.] gave. The defendant excepted.

2. The plaintiffs then, upon the facts stated in the foregoing bill of exception, prayed the Court to instruct the jury, that if they shall believe from the evidence in the case, that H. G. O'Neale, as such agent, was in arrear to the plaintiffs, in the sum of \$398.25, and that afterwards the defendants acknowledged the said sum to be due to the plaintiffs, and promised to pay the same to the plaintiffs within two weeks thereafter, and that they have failed to do so, and that the same is yet due; then the plaintiffs are entitled to a verdict for

such sum as the said sum of \$398.25, with interest from the day of the impetration of the writ in this cause, shall amount to. Which instruction the Court refused to give, and the verdict and judgment being for the defendants, the plaintiffs appealed to this Court.

Wm. Schley, for appellant, cited 1 *Com. on Cont.* 31; *Bull. N. P.* 146; 1 *Bos. and Pull.* 296; 2 *Stark. Ev.* 120.

Palmer, for the appellant, cited *Aubert vs. Maze*, 2 *Bos. and Pull.* 374, 375; *Collins vs. Blantern*, 2 *Wilson*, 351; *Bensley vs. Bignold*, 7 *Serg. and * Low.* 121. Where a contract is prohibited by
258 statute, under a penalty, it is void, though not in terms declared to be so. 2 *Carth.* 252; 1 *Com.* 138; 1 *Bos. and Pul.* 264; *Coleman vs. Wathen*, 5 *Term.* 245; *Steers vs. Lashley*, 6 *Ib.* 61; *King vs. Handy*, *Ib.* 286; *Buck vs. Buck*, 1 *Camp.* 547.

Wm. Schley, in reply, insisted that this case differed from those cited on the other side. They respect the doing of some prohibited act, or some forbidden pursuit; and for which no license could be had. No license could be had which would qualify a person to commit murder, or to engage in smuggling, or to sell impure or unwholesome liquors, or to utter counterfeit coin, or to do any thing else, which is *malum in se*, or even *malum prohibitum*. He cited *Johnson vs. Hudson*, 11 *East*, 180, as illustrating the distinction.

DORSEY, J. delivered the opinion of the Court. The only question which this Court are called on to determine, is, did the County Court err in granting the defendant's prayer in the first bill of exceptions? and to our minds it is obvious that they did. The agreements between O'Neale and Yates and McIntyre, are simply an engagement on the part of the former, to sell lottery tickets, as the agent of the latter. The Act of 1821, ch. 232, does not forbid this; nor were any of its provisions designed to prevent the mere sale of lottery tickets, or to impose upon the seller the necessity of obtaining a license therefor. The only prohibition therein contained, is to the opening, setting up, exercising or keeping, any office or other place for selling tickets, or registering the numbers, or by writing, printing, or otherwise to publish the setting up, opening or using any such office or offices, or other place, without having first obtained a license for that purpose. There is nothing in the agreements, upon any principle of construction applicable to penal statutes, which could warrant a jury,
much less the Court, in inferring that O'Neale had * engaged
259 to open an office, &c. of the character described by this Act of Assembly; and the testimony is equally silent as to his obligations or acts under those agreements. But even suppose that these contracts bound O'Neale to keep an office, &c. is it a fair legal presumption to be drawn by the Court, that Yates and McIntyre intended a violation of the law, and the keeping of such office without license? There is nothing in the nature or terms of the agreements themselves,

or in the testimony contained in the bill of exceptions, which could justify such a conclusion. Dissenting therefore from the opinion delivered by the County Court in the first bill of exceptions, we reverse their judgment. *Judgment reversed, and procedendo awarded.*

GAITHER and WARFIELD vs. WELCH's Estate.—December, 1831.

Absolute judgments at law obtained by a creditor of a deceased against his executor or administrator, amount to an admission of assets, and cannot be resisted on the ground of a deficiency of assets; but as between a creditor and the heir-at-law, in a proceeding to subject the real estate to the payment of his debt, such a judgment is not conclusive, but the creditor may show a deficiency of assets. (a)

An administrator, who has confessed judgment, and thus admitted assets, being a creditor himself, may, as against the heirs of his intestate, for the purpose of subjecting the real estate to his claim, show that in fact the assets are not sufficient to pay all the creditors. (b)

A judgment against an executor or administrator, does not furnish any evidence of the original debt, against the heir-at-law, in a proceeding to sell the real estate for the payment of debts, on the ground of a deficiency of assets. (c)

Where the proceeds of a deceased's real estate are in the Court of Chancery, and a creditor wishes to subject that fund to the payment of his debt, upon the ground of a deficiency of assets, he is not called upon, in the first instance, to exhibit full proof of his claim. That may be done under the order *nisi* on the heirs-at-law. (d)

(a) In *Boteler vs. Beall*, 7 G. & J. 397, the Court said: "This case we think bears a strong analogy to that of *Gaither vs. Welch*, where under our Act of Assembly, making the real estate of the debtor answerable for his debts in case of his not having personal estate sufficient for their payment, it was held, that a creditor who had obtained an absolute judgment against the executor, might, notwithstanding such judgment, in seeking a sale of the realty, offer evidence to show that in point of fact the personal estate was insolvent,—that assets had not come to the hands of the executor, where-with it was his duty to have paid the creditor's claim." See Rev. Code, Art. 66, sec. 1; Art. 64, sec. 9.

(b) Cf. *Collinson vs. Owens*, 6 G. & J. 4.

(c) Cited in *Tabler vs. Castle*, 22 Md. 102, and *McDowell vs. Goldsmith*, 24 Md. 230. The heir has the same uncontrolled discretion in resisting the payment of claims against the realty, that the executor or administrator has in regard to the personalty; and the same right belongs to the devisee in this respect as to the heir. *Bowen vs. Gent*, 54 Md. 570.

(d) Cited in *Griffith vs. Parks*, 32 Md. 5, and *Thomas vs. Farmers Bank*, 46 Md. 56. In *Griffith vs. Parks*, the Court said: "In cases where a deceased debtor's real estate has been decreed to be sold for the payment of a mortgage debt, or for partition among heirs, any creditor of the deceased, if his personal estate has been exhausted, will be allowed to come in by petition, and, upon proof under an order *nisi*, have his claim paid out of the whole or the surplus of the proceeds of the realty so far as they will go; the surplus, after the payment of the mortgage or other prior lien, being considered

APPEAL from the Court of Chancery. On the 6th of November, 1829, the appellants, William Gaither and Joshua Warfield, filed their petition in Chancery, stating among other things, that previously thereto, to * wit, in July, 1826, a decree had passed for the sale of the real estate of Nicholas Welch, deceased, for the payment of a debt due from him to one George Ellicott. That a sale was accordingly made, reported to, and ratified by the Chancellor, and such other proceedings were had, that the auditor of the Court stated an account, whereby the balance of the proceeds of said real estate, after satisfying the complainant's claim, was distributed among the heirs-at-law of said deceased—which account was duly ratified and confirmed by the Chancellor. That said Welch, at the time of his death, was indebted to the petitioner, Gaither, in a large sum of money, for which, after his death, he recovered judgments against the other petitioner, Warfield, and Rachel Welch, his administrators, as will appear by short copies thereof, exhibited by the petitioners in a former petition filed in the same cause, on the 25th of August last. And they also say, that judgments for the same claims were recovered against the petitioner, Warfield, as security for the said Welch. They charge—that although the judgments recovered as aforesaid against the administrators of the said Welch, appear to be absolute judgments, yet in fact the personal estate of the deceased, in the hands of his administrators, at the time of their rendition, was, and is insufficient to pay his debts, as will appear by certain exhibits filed with the former petition. The petitioner, Warfield, alleges, that said judgments were rendered improvidently, and in ignorance of their legal effect, and that he supposed they would only bind a fair proportion of the assets in his hands, under which impression he has accordingly, regularly, and equally distributed the assets amongst the creditors. He also alleges, that he is individually a large creditor of the deceased; and they pray, that the surplus of the aforesaid real estate, distributed as above mentioned, among the heirs-at-law of the deceased, may be applied to the payment of their claims, and all other unsatisfied claims against said estate, which may be properly proved, in equal proportions.

261 * The judgments in favor of Gaither, against the administrators of Welch, and Warfield as his security, exhibited with the first petition, amount to a sum considerably exceeding the balance in the hands of the administrators, as appears by copies of their accounts settled with the Orphans' Court, likewise exhibited with the original petition. The claims due Warfield, filed with the present petition, are less than that balance.

as a *residuum* of the real assets applicable to the payment of debts. This was the course of practice pursued by the late Chancellor BLAND, as may be seen by reference to the case of *Fenwick vs. Laughlin*, 1 Bl. 471, and which practice was approved and commended by the Court of Appeals in the case of *Gaither vs. Welch*."

BLAND, C. on the 9th November, 1829, passed the following order:

The petition of William Gaither, and Joshua Warfield, for themselves, and in behalf of other creditors of Nicholas Welch, deceased, filed in this cause on the 6th inst. having been submitted without notes or argument, the proceedings were read and considered. The petitioners, Gaither and Warfield, presented their claims by a petition filed on the 25th August last, which was disposed of by the order of the 26th of the same month, and feeling satisfied with the correctness of that order, it will be only necessary now to say, why I deem the new matter with which the claim is connected in this petition, to be altogether unavailable. The petitioner, Warfield, states that the judgments were rendered improvidently, and from ignorance on his part, of their legal effect and operation. If ignorance of law to this extent, were to be considered as a sufficient foundation for a Court of equity to interpose, there are few judgments of a Court of common law, which a Court of Chancery might not be called upon to revise and reform. But this Court, can in no case, revise or reform a judgment of a Court of common law in any respect whatever. And there are no such special circumstances of fraud, surprise or mistake, set forth in this petition, as can give this Court jurisdiction to grant relief against those, who as heirs, creditors, or parties, may have a right to avail themselves of the effect and operation of the absolute judgments obtained against the petitioner, Warfield, as the administrator of the late Nicholas Welch: * and therefore, upon this ground, and for the reasons given in the order of the 26th August last, the claim must be again rejected. 262

But the petitioner, Warfield, states, that he is himself a creditor of his intestate. If so, it is perfectly well settled, that he might have at once retained and applied, of the assets which came to his hands, so much as was sufficient to satisfy his own claim; and having this well known legal right, it must be presumed, that he did so retain to that amount; because the absolute judgment rendered against him, was a tacit and conclusive admission, that he had assets sufficient to satisfy that, as well as his own claim; which could only be satisfied, by retainer in whole, or in due proportion with those of others, for which suits might be brought. And since he made no defence on the ground of an insufficiency of assets to satisfy his own claim, as well as that for which the suits were brought, these absolute judgments must be considered as alike conclusive evidence of a sufficiency of assets to satisfy both of them.—Ordered, that the petition be dismissed with costs.

From this order the petitioner appealed to this Court.

The cause was argued before BUCHANAN, C. J., ARCHER, and DORSEY, JJ.

Alexander, for the appellants, contended. 1. That the matters stated in the petition, if proved, would entitle the petitioners to the

relief prayed against the payments recovered by Gaither against the administrators of Welch. 2 *Vernon*, 146. 2. That the petitioner, Warfield, was entitled to relief, in respect of his particular claim; the judgments above mentioned not concluding the said petitioner as to the sufficiency of personal assets, to satisfy his own claim.

No counsel appeared for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. The petition of the appellants appears to have been dismissed by the Chancellor, on the ground that the judgments * at law obtained by William Gaither, against the administrator of Nicholas Welch, were conclusive evidence of a sufficiency of personal assets in the hands of the administrator, to satisfy both their claims; and therefore precluded their proceedings against the real estate of the deceased, which could not be subjected to the payment of their claims, except upon an insufficiency of personal assets, which, by reason of those judgments, they were not permitted to show. As between Gaither and the administrator, the judgments being absolute, do certainly amount to an admission of assets, and the enforcement of them could not be resisted on the ground of a deficiency of assets. But, as between a creditor and the heirs-at-law, in a proceeding to subject the real estate to the payment of his debt, a judgment, though absolute, against an executor or administrator of the ancestor, does not, we think, so stand in his way, but that the creditor may be let in, to show a deficiency of personal assets; and if in this case, Gaither had shewn himself to be a creditor, he would, on proof of a deficiency of personal assets, have been entitled to come in among other creditors, for a just proportion of the surplus proceeds of the real estate of Nicholas Welch, remaining after satisfying the lien which the land had been sold, under a former decree of the Chancellor. The judgments alone against the administrator of Nicholas Welch, exhibited in the petition, would not, it is true, have furnished any such evidences of debt, as against the heirs-at-law, as to entitle him to payment out of the surplus proceeds of the real estate, even if he had been permitted to prove a deficiency of assets; and at the time of the rejection of the petition, he had offered no other evidence of his claim. But the fund proceeded against, being already in Court, under a sale before made, it was not indispensably necessary that full proof of his claim should have been exhibited with the petition; but if the petition had not been dismissed on another ground, that proof might have come in, in the further progress of the proceedings, under an order *nisi* on the heirs-at-law, on the principle of the * rule that appears to have been adopted by the Chancellor

264 in the case of *Fenwick and Bird vs. Loughlin and Hawkins*, in the Court of Chancery, and which we think a convenient rule. With respect to Joshua Warfield, the other petitioner, there is no objection to the character of the evidence exhibited with the peti-

tion, in support of his claim. But he is himself the administrator of Nicholas Welch, and by his own showing, by his several accounts as settled in the Orphans' Court, there appears to be in his hands, assets to a much larger amount than sufficient to satisfy his debt; and if there are no other subsisting, unsatisfied claims against the estate, or not to an amount exceeding, together with his, the amount of the personal assets remaining in his hands, there is no pretence for his going against the real estate. But if there is in fact, a deficiency of personal assets, to meet the subsisting claims against the estate, notwithstanding the judgments obtained by Gaither, the other petitioner, are conclusive against him, as between Gaither and himself; yet we think they have not the effect to preclude him from shewing such deficiency, in order to let in his claim against the proceeds of the real estate. It is our opinion, therefore, that the petition ought not to have been dismissed but that the petitioners should have been permitted to show a deficiency of personal assets, by the admissions of the heirs-at-law, or as they could, if such was the fact, and an opportunity offered them of establishing their respective claims.

Decree reversed.

* CITY BANK OF BALTIMORE *et al.* *vs.* JAMES SMITH. 265
December, 1831.

S. gave his note, payable 50 days after the drawing of a lottery should be completed, "in cash, or prize tickets in said lottery," and secured the same by a mortgage. The mortgagee, two years after the drawing, assigned the mortgage. The tickets in the lottery certified that the holder thereof would "be entitled to such prize as may be drawn to its number, if demanded within 12 months after the completion of the drawing, subject to a deduction of 15 per cent. payable 60 days after conclusion." Upon a bill filed some years after the assignment, to sell the mortgaged premises for payment of a balance due upon the note, it was *held*, that prize tickets which had not been presented to the managers of the lottery for payment, within the 12 months, could not be set-off against the complainant's claim.

The prize tickets stipulated to be received in payment of the note, were intended to be available tickets, upon which the holders would be entitled to demand and receive, the prizes drawn to their respective numbers. They were those on which the prizes had been demanded within 12 months from the completion of the drawing, or on which the holder was entitled to demand the prizes, 12 months not having elapsed from the time of the drawing.

Equity will relieve against penalties and forfeitures, where the matter lies in compensation, whether the condition on which they depend, be precedent or subsequent. But notwithstanding it will in many cases interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate,

by giving an estate that never vested, and that by reason of the non-performance of a condition precedent, will not vest in law. (a)

APPEAL from the Court of Chancery. The present bill was filed by the appellants, the President and Directors of the City Bank of Baltimore, James Sterrett and others, against the appellee, on the 16th day of October, 1827: it stated that James Sterrett, with one Eli Simkins, and John P. Usher, parties complainants, carrying on business under the firm of Simkins and Usher, and Govert Haskins, contracted with the managers of the Washington Monument Lottery, 3d class, for the purchase of the scheme: that the appellees, James Smith and W. H. Clendenin, being indebted to the said James Sterrett, as the treasurer of the contractors, in the sum of \$13,365, upon a promissory note, dated July 26th, 1817, given for tickets purchased by * Smith, in said lottery, and payable fifty days after
266 the completion of the drawing thereof, conveyed to Sterrett by way of mortgage, to secure the payment of the note, a certain house and lot in the City of Baltimore, by deed, bearing date the 28th of July, in the year aforesaid, with a provision, that the same should be void, if Smith should pay to Sterrett the sum of money in the note expressed, according to the terms thereof, either in cash, or prize tickets in said lottery, as by a copy of the deed exhibited with the bill, will appear. The bill then states, that the drawing of the lottery was completed on the 12th of December, 1817, and that Smith made various payments, in cash, or prize tickets, on account of the note, and that on the 18th of April, 1820, there remained a balance due thereon, for principal and interest, of about \$3,000; that Sterrett, by deed dated on the 18th of April, 1820, assigned the mortgage for a valuable consideration, to the City Bank of Baltimore; but that Smith, the mortgagor, refused to pay the same, or any part of the money due thereon, to the said City Bank. Prayer, that the mortgaged property be sold to pay the debt, and for general relief.

The answer of Smith admitted the execution of the note and mortgage, as stated in the bill, but denied that the debt therein mentioned was due to Sterrett in his own right; but as trustee for the persons who contracted for the purchase of the scheme of the lottery mentioned in the bill, and charged that defendant purchased of the tickets of said lottery, to the amount of the note referred to, and that the mortgage was given to secure the same, and for no other purpose: that he has made many payments, and is also entitled to considerable credits for lottery prizes, which have not yet been allowed him, and that when every thing to which he is entitled shall be credited, nothing will be due upon the aforesaid note: that Eli Simkins, one of the contractors, is largely indebted to defendant, and he is informed, and believes that the contractors made heavy profits by

(a) Cited in *Davis vs. Gray*, 16 Wallace, 231, and *Earle vs. Dawes*, 3 Md. Ch. 283.

the purchase and sale of said lottery, and he insists that he has a right to set-off the proportion * of the same, to which said Simkins may be entitled, against the amount due on his said note : **267** that Sterrett, the treasurer of the contractors, has never settled with them for their proportion of the profits of the lottery, but that he has converted the same to his own use, and that the assignment by him to the bank of this defendant's note and mortgage, was without their knowledge or approbation, and wholly unauthorized and void.

The note referred to in the bill and answer, is in these words : "Baltimore, 26th July, 1817. (\$13,365.) Fifty days after the drawing of the Washington Monument Lottery, third class, is completed, we, the subscribers, jointly and severally, promise to pay to James Sterrett, or order, in cash or prize tickets in said lottery, the sum of thirteen thousand three hundred and sixty-five dollars, for value received."

The assignment by Sterrett to the bank, dated April 18th, 1820, recites, among other things, "that, whereas there now remains due on said mortgage, the sum of \$3,000, or thereabouts, inclusive of interest; and whereas, in part satisfaction and discharge of a debt due from the said Sterrett to the said bank, the said Sterrett hath proposed and agreed to execute these presents. Now this indenture witnesseth, that for and in consideration of the above recited premises, and of the sum of five dollars, lawful money paid, the said Sterrett, &c."

A commission issued, under which depositions were taken and returned.

John S. Gittings, examined on the part of complainants, proved, that there were sundry endorsements on the note of Smith and Clendenin, all of which, down to the 6th of April, were in the hand-writing of Sterrett, when a balance of \$3,254.80, was struck; that the subsequent endorsements down to the balance of \$2,847.60, are in deponent's hand-writing, he having been a clerk in the City Bank for three years, and that the final balance of \$2,747.60 is in the hand-writing of said Sterrett. Defendant frequently acknowledged * to deponent to owe the balance appearing due at different **268** periods, and when called upon promised payment.

Govert Haskins, on the part of the defendant, proved, that he was interested in the purchase of the lottery referred to in the bill and answer, and that from information received from Sterrett, he believes it resulted profitably, though he has not received his proportion, nor settled with Sterrett for the same, notwithstanding frequent applications to him for that purpose. Sterrett was a joint contractor and treasurer for the purchasers; the witness also stated, that the note, which the mortgage from defendant to Sterrett was given to secure, was given for a number of tickets which defendant purchased from Sterrett, as the treasurer of the contractors, and that he, the defendant, never authorized Sterrett to assign said note and mortgage.

It was proved on the part of defendant, that Sterrett, Simkins and Haskins, purchased the scheme of the lottery from the managers, and that they paid the purchase money; that they gave bond to the managers for the payment of the prizes, which the witness (who was treasurer for the managers) supposes they paid, as the managers had been called on for none.

John B. Morris, on the part of complainants, proved, that in the latter part of the year 1820, the defendant called at the City Bank of Baltimore, and was there for some time in conversation with deponent; that defendant at that time observed he would give a note, provided the bank would cancel the mortgage; and that in a subsequent conversation, defendant received the proposition to give a note, provided the mortgage was cancelled, which deponent said could be of no use, as the bank after obtaining judgment on the note, could give indulgence; that it was not until the latter part of the year 1820, that the bank were apprised that pretensions to an interest in said note, were set up by any one, and that the note had been assigned to the bank twelve months prior to his conversation with defendant. It was further proved by a witness who was present

269 at the examination * of John B. Morris, that at that time, defendant remarked he had offered Morris an endorsed note, for the note which the bank held secured by the mortgage; that Morris replied, that he might have done so, but it had escaped his recollection. It was proved that the drawing was completed on the 12th December, 1817. The following is a copy of one of the prize tickets, produced by Smith, as a set-off:

“Washington Monument Lottery, third class. The holder of this ticket will be entitled to such prize as may be drawn to its number, if demanded within twelve months after completion of the drawing, subject to a deduction of fifteen per cent. payable fifty days after conclusion. Baltimore, June, 1816. F. Lucas, Jr. Mr. No. 22,431.”

In conformity with an order of the Chancellor, the auditor stated an account between the parties.

No. 1, stated agreeably to the complainants' instructions, showed a balance due them for principal and interest on the 12th June, 1818, of \$2,444.69. In this account the defendant is charged with the amount of his note, and credited for payments in cash and prize tickets, claimed within twelve months after the completion of the drawing, as limited on the face of them, and for a pair of oxen, &c.

No. 2. An account stated in conformity with the defendant's views, credits him for all the prizes, as well for those demanded since, as those demanded before the expiration of twelve months after the drawing of the lottery, and shows that he had over-paid the principal of the note by \$14.80, though a small balance of interest remained due. Many of the prizes credited in account No. 1, as having been demanded within the twelve months, were for small sums, whilst some of those which were rejected on that account, because not pre-

sented in time, but credited in account No. 2, are for \$100, and some \$500; they were exhibited to the auditor on the 30th of July and 20th October, 1825. To the allowance of these prizes the complainants excepted.

BLAND, C. at September Term, 1830, confirmed account No. 2, and decreed that defendant pay to the complainants, * or bring into Court, to be paid them, the amount therein stated to be **270** due; and that each of the parties pay their or his respective costs.

From this decree the complainants appealed to the Court of Appeals.

The cause came on to be argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

John I. Donaldson, for the appellant, contended, 1. The prize tickets, where the prizes were not demanded within the twelve months, could not be set-off against the original parties to the contract: he insisted that it was the policy of the lottery system, to limit a time for the presentation of prize tickets, that the whole scheme might be brought to a close within an early period; and it was designed that the prizes should be forfeited, if not demanded within the prescribed time. *Barruso vs. Madan*, 2 *Johns*. 145. The presentation within the time, was a condition precedent to a title to the prize, against which equity will not relieve. 1 *Chitty's Eq. Dig.* 224; 2 *Eq. Cases Abr.* 209; *Popham vs. Bampffield*, 2 *Vernon*, 83. 2. But if they could be set-off against the original parties, they cannot be against the assignees after the admission to the agents of the City Bank that the defendant owed the money.—*Chambers vs. Goldwin*, 9 *Ves.* 270; *Chapman vs. Hart*, 1 *Ves. Sr.* 272; *Kemp vs. McPherson*, 7 *H. & J.* 320.

Johnson and Mayer, for the appellee, said that the rule now is that equity will relieve against a condition unperformed if the case be such that compensation can be made, or the parties placed in the same situation as if the condition had been performed. *Moss vs. Matthews*, 3 *Ves.* 279; *Vernon vs. Stephens*, 2 *P. Wms.* 66; *Oddy vs. Torlas*, 2 *Vern.* 362; *Cattell vs. Money*, 3 *Bro. Ch. C.* 256; *Taylor vs. Popham*, 1 *Ib.* 168; 1 *Bac. Ab.* 642; 1 *Madd. C. P.* 41. They also cited *Brinckerhoff vs. Lansing*, 4 *Johns. Ch.* 65, 71; *Sug. Ven.* 649–651, (5th *Eng. Ed.*)

Taney, (Attorney-General of the United States,) in reply referred to 1 *Chitty's Dig.* 224, 453; 2 *Eq. Cas. Ab.* 229.

* BUCHANAN, C. J. delivered the opinion of the Court. The note given by the defendant to James Sterrett, to secure the payment of which, the mortgage to Sterrett was executed, was for the price of a number of tickets in the Washington Monument Lottery, third class (the scheme of which had been purchased from the **275**

managers by Sterrett and others,) and payable by its tenor, in cash or prize tickets in that lottery, fifty days after the drawing should be completed. The drawing of the lottery was completed on the 12th of December, 1817, and the bill being for the foreclosure of the mortgage (which, on the 18th of April, 1820, was transferred to the complainants, the President, Directors, and Company of the City Bank of Baltimore, in consideration of a debt due from him to them, and a further pecuniary consideration,) and a sale of the mortgaged premises, to satisfy the balance claimed to be due on the note, various payments having been before made by the defendant in cash or prize tickets, the question is, whether the defendant is at this time entitled to a credit for a number of prize tickets, which were not demanded within twelve months after the completion of the drawing of the lottery?

It can scarcely be doubted that the prize tickets stipulated to be received in payment of the note were intended to be available tickets; not such as had lost their validity, but tickets, on which the holder would be entitled to demand and receive the prizes drawn to their respective numbers. None other would be a prize ticket within the
276 * meaning of the contract; and as it relates to prize tickets in the 3d class of the Washington Monument Lottery, it is proper to inquire what was a prize ticket in that lottery, on which the holder was entitled to receive the prize drawn to its number. That inquiry is gratified by an inspection of the tickets themselves, by each of which the holder is advised, in the language of the ticket, that he "will be entitled to such prize as may be drawn to its number if demanded within twelve months after the completion of the drawing." It was not a concealed or hidden purpose, or of doubtful import, but a palpable notice to all the world, by which every purchaser was informed of the terms on which alone he could become a successful adventurer. It informed him that a prize being drawn to the number of his ticket, was not alone sufficient; but that, to entitle himself to such prize, it was necessary he should demand it within twelve months after the completion of the drawing. A prize ticket, therefore, in the third class of the Washington Monument Lottery, the holder of which was entitled to the prize drawn to its number, was one on which the prize had been demanded within twelve months from the completion of the drawing: or one, the holder of which was entitled to demand the prize, twelve months not having elapsed from the time of the drawing. It was a part of the scheme of the lottery, that the prizes not demanded within twelve months should become a part of the fund, which it was the object of the lottery to raise; and the probability that a portion of them would not be demanded, entered into the calculation of the chances. To which scheme, and to the condition plainly expressed upon the face of such ticket, every purchaser gave his assent, by the act of becoming a purchaser.

The time and circumstances attending the claim to a credit for these tickets, are not such as to invite the favorable consideration of the Court. The note was given on the 26th of July, 1817, and the mortgage, we have seen, was transferred to the President, Directors and Company of the City Bank of Baltimore, on the 18th of April, 1820, * more than two years afterwards. Between the date of the note and the assignment of the mortgage, various payments were made on the note by the defendant, in cash or prize tickets, leaving a large balance, which, it is proved by John S. Gittings, then acting as the agent of Sterrett, he frequently admitted to him was due, and promised to pay. Here the inquiry forces itself upon us, why, if he then owned, or was in possession of the prize tickets, for which he now claims a credit, and thought himself to be entitled to do so, did he not apply them to the payment of the note, or claim a credit for them, when he was making payment in other prize tickets? They amounted to a large sum (several thousand dollars,) too large a sum it would seem to have been overlooked or forgotten. And why, with such ready means of payment, did he acknowledge to the agent of Sterrett that he owed the balance appearing upon the note to be due, and frequently promise to pay it? In the latter end of the year 1820, after the assignment of the mortgage, and when he had a knowledge of that assignment, he at different times, in conversations with John B. Morris, who was acting for the bank, proposed to give a note for the balance due on the note in question, if the bank would cancel the mortgage. And it is proved by another witness that he heard him several times say to John B. Morris that he had also offered an endorser. Why did he not then, when negotiating with Morris for an adjustment of the balance claimed to be due upon the note, instead of offering a new note for that balance with an endorser, offer in payment the prize tickets for which he is now claiming a credit? If he then possessed or owned them, and was entitled to the credit claimed, it is difficult to conceive that he could have forgotten them, or why he did not claim to be allowed for them when pressed for a settlement of the note; they were prizes, many of them of \$20, others of \$50, and some of \$500 each. It was not that he was inattentive to his interest, because he did claim other credits; and if he had the tickets, and supposed he was entitled to it, he ought to have claimed * this. It was a matter peculiarly within his own knowledge, for the bank cannot be presumed to have known that he had such tickets in his possession, and that it was his duty to have disclosed it, if he intended ever to set them up against the claim upon the note and mortgage, or supposed he had a right to do so; and not by concealment to deceive the bank at the very moment when he was pressed for payment of the balance claimed upon the note. The original bill for a foreclosure of the mortgage, which was filed in May, 1820, was dismissed for the want of proper parties, on the 21st of December, 1826; but by an

agreement appearing in the record, all the proceedings and evidence in that case are to be used in this. In his answer to that bill, the defendant sets up no pretence that the note was satisfied, or that he was entitled to any credit on account of any tickets in his possession. And although testimony was taken under the commission in relation to a few prize tickets which were alleged to have been lost, amounting to something more than \$78, and for which a credit had been claimed, and also in relation to a pair of oxen, both of which credits are allowed by the auditor in his statement; yet no testimony whatever was taken, nor claim set up, in relation to those prize tickets, of so much more importance, until July, 1825, when, for the first time, they were exhibited before the auditor, and the amount of the prizes insisted on as a credit against the note more than seven years after the drawing of the lottery, and more than five years after the filing of the bill. During the whole of this time, the defendant was pressed for payment of the balance claimed to be due on the note, and for the greater part of the time proceedings in Chancery were going on to enforce the payment. From all which, the conclusion is irresistible, that the defendant was not in possession of, nor had any interest in the tickets in question, at any time, before the assignment of the mortgage to the bank, nor until long after. And he comes into a Court of Chancery with a bad grace, insisting upon a credit for them now, to which, by his proposal to give a note with an endorser,* for the amount claimed to be due, if the bank

279 would cancel the mortgage, he virtually admitted he was not at that time entitled, and without showing how, or when, or from whom he obtained the tickets for which the credit is claimed. By the stipulation in the note of the defendant, that it should be payable in cash or prize tickets, such tickets were meant as would, at the time of payment, entitle the holder to their prizes, which, according to the terms of the condition expressed upon the face of each of them, is not the character of the tickets, for which, the defendant now claims a credit against his note, none of them having been demanded within twelve months after the drawing of the lottery; and consequently not being such as entitle the holder to the prizes drawn to their numbers. And adhering to the express terms of the lottery, if this was a proceeding by James Sterrett and the other purchasers of the scheme to enforce the payment of the note, the defendant would not be entitled to the credit he claims; the omission by the holders of tickets to demand the prizes in time to entitle themselves to them, being one of the sources of profit which the purchasers of the scheme had a right, and probably did look to and rely upon as a part of the scheme of the lottery. In that respect, occupying the position of the original managers, for they purchased the scheme with all its advantages. It was only by the terms of the note that prize tickets were made receivable at all in payment: for without that stipulation the defendant would have had no right to pay off his note in prize

tickets, and to settle his claim for prizes in that way, but must have looked to the original managers for payment of his prizes; and to compel the receipt now of such as are not available, and do not entitle the holder to demand and receive the prizes from the managers, would not be to oblige the parties to fulfil their engagement, but to coerce them to do what they never contracted to do, what, by the terms and spirit of their engagement, they were under no obligation to do; for their engagement was not to receive in payment tickets that would not entitle the holder to the prizes * drawn to their respective numbers; and as to such tickets, it is as if there **280** was no stipulation to receive prize tickets in payment at all, and the note was payable in cash only. And if the defendant would not be entitled to a credit for those tickets, as against Sterrett and the other purchasers of the scheme, in proceedings by them to foreclose the mortgage, what pretence is there for such an allowance, as against the assignees of the mortgage, who took it more than two years after the drawing of the lottery had been completed; and when the balance claimed on the note was acknowledged by the defendant to be due, and no claim to a credit for those tickets had been set up, nor until five years afterwards, though the defendant was pressed for payment, to which he might have applied them at any time within twelve months after the drawing, if he was then in possession of them, of which there is no evidence, but every reason to believe that he did not obtain possession of them for many years after the title of the assignees had accrued. And though the note informed them that it was payable in prize tickets, yet they were also informed by the tickets themselves that the defendant could not, according to the scheme of the lottery, be in possession of any tickets applicable to that purpose when they received the assignment of the mortgage; the time having elapsed within which alone the holders of tickets were entitled to demand and receive the prizes drawn to their numbers. They took the assignment of the mortgage, therefore, not only, without notice of any subsisting claim to a credit for these tickets, but with the assurance, looking to the terms of the lottery as proclaimed on the face of each ticket, that there could be no such claim.

But it has been strongly urged, that the assignees of the mortgage took it subject to all the equity of the mortgagor as against the mortgagee; and that this being the case of a condition, equity will relieve against the effects of the non-performance of it, by giving to the defendant the benefit of the prizes, though not demanded according to the condition. * Equity will relieve against penalties **281** and forfeitures, and where the matter lies in compensation, whether the condition be subsequent or precedent; as if it be for the payment of a certain sum of money at a certain day, and the payment at a subsequent day will be a compensation for the non-performance, the intent being to secure the payment of the money.

But notwithstanding it will, in many cases, interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate, by giving an estate that never vested; it will not vest an estate, that by reason of the non-performance of a condition precedent will not vest in law. This is not a case of forfeiture; no right to the prizes for which the credit is claimed, was ever acquired, to be forfeited. Nor is it one in which the matter lies in compensation; for if the defendant is to be relieved against the non-performance of the condition, by being allowed a credit for the amount of the prizes drawn to the numbers of those tickets—what is to be the compensation to the assignees of the mortgage, who would thus lose the amount of the prizes so credited? It is not within the principle on which equity will relieve, where a compensation can be made, as where the condition is for the payment of a certain sum of money at a certain day, the breach of which condition may be compensated by payment at a subsequent day. But here the entire loss would rest upon the assignees of the mortgage, without any compensation; and it would be the same, if the proceeding was by the purchasers of the scheme, who by the allowance of the credit here claimed, would be deprived of the benefit of the prizes, without any compensation, to which, by the omission to demand them within twelve months after the completion of the drawing of the lottery, they become entitled, as a part of the profits of the scheme, and of their purchase. Neither is it the case of a condition subsequent; but a demand within twelve months after the completion of the drawing, was a condition precedent to the vesting of the right to the prizes, and without the * performance of which, the right could not vest in law; and equity will not relieve by interposing to vest the right.

We therefore think, that the defendant is not entitled to the credit claimed; and that the decree ought to be reversed with costs; and a decree passed for a foreclosure and sale of the mortgaged premises, to satisfy the amount due, with interest, according to account No. 1, as stated and reported by the auditor.

Decree reversed.

JOHN B. STIMMEL vs. JOHN UNDERWOOD.—December, 1831.

The current of decision in modern times, both in England and the United States, has set against all objection to the admissibility of a witness, unless his interest be a legal interest. There is no other safe standard of exclusion than a legal interest. (a)

It is no objection to the competency of a witness, that he had been heard to say some months before the trial, he felt himself bound to pay the plain-

(a) Cited in *Crawford vs. Brooke*, 4 Gill, 217, and *Reynolds vs. Manning*, 15 Md. 519. But see Rev. Code, Art. 70, sec. 1.

tiff the amount of the controversy, if the plaintiff did not recover, the witness having been since released by the plaintiff.

A mistaken belief, or an honorary obligation, on the part of a witness, that he is bound, or ought to pay the plaintiff's claim, in case he should not recover in the action, does not render the witness incompetent.

Evidence of unsworn declarations of a witness is inadmissible to impeach his competency.

The undertaking of a security for costs upon the record may be stricken out, and a new and sufficient security, in the discretion of the Court, substituted, to make the first security a witness for the plaintiff.

Per FREDERICK COUNTY COURT.

APPEAL from Frederick County Court. This was an action of assumpsit, commenced on the 1st August, 1826, by the appellee against the appellant, on a promissory note payable at four months from the 25th of September, 1815, of which the appellant was the maker, endorsed by one Philip Buzzard to J. R. Buzzard, and by him to the plaintiff. The defendant pleaded *non assumpsit* and limitations, to which there were issues.

*1. At the trial the plaintiff produced the note with the endorsements thereon, and offered to prove the execution of the same and the endorsements, by John R. Buzzard, one of the endorser. Upon an objection to his competency, on the ground of interest, the plaintiff produced a release, executed by him to the witness, dated on the 26th of October, 1827, and offered to prove by L. P. W. Balch, the subscribing witness thereto, that it was executed by the plaintiff, on the day of its date, and delivered to the witness on the 12th day of March, 1828, by the said Balch; but the defendant objected to the competency of Balch to testify in the cause, because of his being security for the costs in the action. The plaintiff then, against the consent of the defendant, moved to strike out the name of said Balch, as security for the costs, and to substitute other sufficient security in his place, which, by the permission of the Court was accordingly done, and the said Balch was then adjudged by the County Court to be a competent witness. The defendant excepted. 283

2. After the testimony offered in the first bill of exceptions, which is to be taken as a part of this, had been given, the defendant proved by a competent witness, that in the early part of November, 1827, he heard John R. Buzzard, (the witness produced and sworn by the plaintiff,) say, that he had said, that he, the witness, felt himself bound to pay the plaintiff the amount of the claim in controversy, if the plaintiff did not recover the same in this action; and that Buzzard also said, he then felt himself bound to pay the same, provided the plaintiff did not recover it from the defendant. The plaintiff then proved by said Balch, that he had not given any notice to Buzzard of the execution of the release, until the 12th of March, 1828; that no person was present at the time of its execution but him (Balch) and the plaintiff, and that the release has ever since

been in his (Balch's) possession. The defendant thereupon objected to the competency of Buzzard as a witness for the plaintiff; but the Court overruled the objection, and permitted his testimony to go to the jury. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before STEPHEN, ARCHER, and DORSEY, JJ.

F. A. Schley, for the appellant, abandoned the first exception, and upon the second exception, cited 2 *Stark. Ev.* 299, 300; *Dickinson vs. Prentice*, 4 *Esp. Cases*, 32; *Peak's Ev.* 165, (*Old Ed.*;) *Innis vs. Miller*, 2 *Dallas*, 50; *Fotheringham vs. Greenwood*, 1 *Strange*, 129; *Trustees of Lan. vs. Willard*, 8 *Johns.* 428; *Trelawney vs. Thomas*, 1 *Hen. Blk.* 306; *Pederson vs. Stoffles*, 1 *Camp.* 145; *Richardson's Ex. vs. Hunt*, 2 *Mumf.* 148; *Skillingier vs. Belt*, 1 *Conn.* 147.

Palmer, for the appellee, cited *Bent vs. Baker*, 3 *Term*, 27; *Fotheringham vs. Greenwood*, 1 *Strange*, 129; *Trelawney vs. Thomas*, 1 *Hen. Black.* 307; *Rudd's Case*, *Leach C. C.* 154; 1 *Phillip Ev.* 43; *Saund. P. and E.* 947; 2 *Starkie's Ev.* 4 Pt. 747; *Union Bank vs. Knapp*, 3 *Pickering*, 108; *Smith vs. Downs*, 6 *Conn.* 365; *Gilpin vs. Vincent*, 9 *Johns.* 219; *Moore vs. Hitchcock*, 4 *Wend.* 292; *McVeagh vs. Goods*, 1 *Dall.* 62; 2 *Dall.* 50, (*Innis vs. Miller*;) *Long vs. Bailie*, 4 *Serg. and Raw.* 222; *Fernsler vs. Carlin*, 3 *Serg. and Rawle*, 130; *Henry vs. Morgan & Cox*, 2 *Binney*, 497; *Pollack vs. Gillispie et al.* 2 *Yates*, 129; *Peters vs. Beall*, 4 *H. & McH.* 342; *Ringgold vs. Tyson*, 3 *H. & J.* 178; *King vs. Fox*, 1 *Strange*, 652; *Bull. N. P.* 290.

287 * ARCHER, J. delivered the opinion of the Court. The question has been discussed, whether a witness' belief of his interest in a cause, when in truth he has no interest; or whether his being under an honorary obligation to pay, if the person for whom he testifies fails in the action, will render him incompetent. Upon this subject there has certainly been much diversity of opinion; but the current of decision in modern times, both in England and the United States, has set against all objection to the admissibility of a witness, unless his interest be a legal interest. Notwithstanding the determination in 1 *Strange*, 127, and the views expressed in 1 *Hen. Black.* 307, the universally received opinion in England, at this day, is against such objection, as will be perceived by a reference to 1 *Phillips' Ev.* 40; 2 *Stark. Ev.* 746, and 2 *Saund. Plea & Ev.* 560. These books are not cited as of authority in themselves, but as indicating that the opinions of men of science, at this day, in that country, are in favor of the modern decisions. In this country too, although there is considerable diversity of views, in the different States upon these subjects, the opinion, that the witness is admissible, appears to be gaining ground. In Kentucky, Massachusetts, and Virginia, the witness is excluded; in Vermont he is

admitted; 2 *Tyler*, 273; and whatever views may at one time have been entertained in Pennsylvania, upon this subject, the rule is now definitively settled, as will appear by reference to 2 *Binney*, 497; 3 *Serg. & Rancle*, 130, and 4 *Ib.* 226, that the witness is competent. The same remarks may perhaps be also made in reference to the State of New York, 9 *Johns.* 220; 3 *Cowen*, 252. And in this State it was determined as long ago as the year 1799, by the General Court, in the * case of *Peters vs. Beall*, 4 *H. & McH.* 342, that where evidence was offered to the Court, to show the interest of a witness, if it appear to the Court he is not interested, he shall be sworn, although the witness himself should think he has an interest. Upon principle, there can be no propriety in rejecting the witness, for if he believes he has an interest, all the bias arising from the existence of such a belief, it might reasonably be presumed, would be removed when he is informed by the Court that his belief was unfounded, and that in truth he had no legal interest. But if a bias should, notwithstanding, remain, it ought to go to his credit, and not his competency, there being no other safe standard of exclusion, than the existence of a legal interest. If it were to be considered, that the true test, was the witness' belief, he might, notwithstanding a release, disbelieve in its efficacy to discharge him. Nor can there be any propriety in rejecting a witness, who feels himself under an honorary obligation to pay the debt; for it has been well observed, that it would savor of inconsistency to discard a witness as unworthy of belief, whose honor coerced him to pay money, which the law would not compel him to pay. The same feeling which would induce him to pay the money, would more strongly prompt him to speak the truth.

But the case before the Court is not one in which the witness, when called to the stand, swears he believes he has an interest in the event of the suit, or that he is under an honorary obligation to pay, unless there should be a recovery against the party, against whom he is called to testify; but evidence is adduced to show, that the witness, attempted to be excluded, had four months before the trial of the cause, been heard to say, that he felt himself bound to pay the plaintiff the amount in litigation in that suit, if the plaintiff did not recover. It is clear he had no interest in the event of the suit and if he had any, it had been formally released. This case then presents the question, whether the mere declaration of a witness, as to his obligations, can render him incompetent to testify, although the witness shall * palpably have mistaken his legal obligations, or viewing the declarations of the witness, as referring to a mere honorary obligation, whether such declarations, will exclude him from testifying? Now, if these declarations, when made by the witness on the stand, under oath, would not, and ought not, to exclude him, *a fortiori*, his statements and declarations, not under oath, ought not to exclude him; and even, if at the trial, his

his belief of his legal or honorary obligations rendered him incompetent, it would not follow that his declarations of such obligations anterior, to the trial would or ought to have the same effect: for his notions of obligations may have undergone a change between the time of making of such declarations and the trial—and at the time of the trial his mind might be free from all bias, which such belief might be calculated to produce; besides, the establishment of such a principle, would seem to lead to consequences subversive, of justice in many cases, for the doctrine assumes, as has been well observed, the truth of unsworn statements, and enables an unwilling witness, *ad libitum*, to deprive a party of his testimony. In conformity with these views, the cases of 5 *Massa*. 261, and 8 *Massa*. 487, were decided.

The Court are aware of the case of *Colston vs. Nichols*, decided by the Court of Appeals, under its former organization, 1 *H. & J.* 105, in which the decision of the General Court, that evidence of unsworn declarations of a witness were inadmissible to impeach his competency, was overruled—but this Court cannot accede to the doctrine, that the adduction of such evidence, although it might be calculated to affect the credit of the witness, went to his competency.

The first exception having been waived by the appellant's counsel, it does not become necessary for us to express any opinion upon it.

Judgment affirmed.

290 * PHILIP BLESSING *vs.* JOHN HOUSE'S Lessee.—December, 1831.

In an action of ejectment where defence was taken on warrant, and plots were returned, the defendant offered in evidence a deed for "all that part or parcel of land lying and being in, &c. as has been willed by the said W. (the grantor) to his said daughter, (the grantee) as will more fully show by reference to the said last will and testament, bearing date, &c. for 100 acres, it being designated by the Old Cabin Farm, it being likewise to be taken from that part or parcel of land the said W. bought of H. to be laid off by the said W's executors, at his death, for 100 acres;" and also offered in evidence another deed between the same parties, which purported to confirm the first deed. The second deed described the land by metes and bounds. The two deeds were offered as constituting one valid deed. The first deed was not located on the plots, the second deed was. The will of W. was not produced, nor did it appear that his executors had laid off any land for the grantee. *Held*, that the first deed was void for uncertainty—could not be read because not located, and that the second deed could not operate as a confirmation of the first. (a)

(a) See *Hammond vs. Norris*, 2 *H. & J.* 118, *note*, as to description of the subject-matter in a deed of conveyance.

No title paper in an ejectment, where defence is taken on warrant, can be read in evidence, unless it is located. (b)

It is an essential attribute of a tenancy in common, that there should be a unity of possession; wherefore, therefore, the tenure of the estate intended to be conveyed indicates a holding in severalty, or by particular or specific description, a tenancy in common cannot exist.

It is the office and operation of a deed of confirmation, to corroborate and give legal effect to a voidable, and not a void estate. It cannot work upon an estate void at law. (c)

APPEAL from Frederick County Court. Ejectment for a tract of land lying in Frederick County, called More Bad than Good, containing 265 acres.

The defendant (the present appellant) took defence on warrant, and plots were returned. Issue was joined upon the plea of not guilty.

At the trial, the plaintiff offered in evidence the patent for the tract of land called More Bad than Good, granted to William House for 265 acres on the 27th October, 1795. And then proved that the land is duly located on the plots by the plaintiff, agreeably to the courses and distances contained in the patent; that the tract of land called * More Bad than Good, has acquired by reputation, and is known in the county as and by the name of The **291** Resurvey on More Bad than Good. He then offered in evidence a deed duly acknowledged and recorded from William House, (the patentee) to John House the lessor of the plaintiff, for 76 acres and 25 perches of land, bearing date on the 9th August, 1817; and proved that the said deed is duly located on the plots.

The defendant then offered in evidence a deed from Archibald Edmonson to John Holland, dated 19th Dec'r, 1771, for 200 acres of land, called Part of the Resurvey on Drunkards not Mistaken; and also for another tract called Grog, containing 54 acres of land, and then offered the deed from John Holland to William House, dated the 2d November, 1793, for the same lands called The Resurvey on Drunkards not Mistaken, containing 200 acres, and Grog, containing 54 acres, and proved that said lands are properly located on the plots in this cause. The defendant then offered in evidence the following deed from William House to Mary Harvey: "This indenture made this 9th July, 1817, between William House of, &c. of the one part, and Mary Harvey, daughter of the said W. H. of the other part, witnesseth: that the said W. H. as well for and in consideration of the natural love and affection which he, the said W. H. hath and beareth unto the said M. H., as also for the better maintenance, support,

(b) Cited in *Langley vs. Jones*, 26 Md. 478. But see Rev. Code, Art. 64, sec. 24, amended by the Act of 1882, c. 372.

(c) Approved in *Dewing vs. Perdicaries*, 96 U. S. 195, and *Cronise vs. Clark*, 4 Md. Ch. 407.

livelihood, and preferment, of her, the said M. H. hath given, granted, &c., and by these presents doth give, grant, &c., unto the said M. H., her heirs and assigns, all that part or parcel of land, lying and being in, &c., as has been willed by the said W. H. to his said daughter M. H., as will more fully show by reference to the said last will and testament, bearing date the 4th July, in the year of our Lord, 1817, for 100 acres of land, it being designated by the Old Cabin Farm, it being likewise to be taken from that part or parcel of land the said W. H. bought of Holland, to be laid off by the said W. H.'s executors

292 at his death, for 100 acres * of land, together with all and singular the houses, buildings, &c., unto the said M. H. as aforesaid, or any part or parcel thereof belonging, or in any wise appertaining or therewith commonly held, used, occupied, enjoyed or accepted, reported, taken or known, as part or parcel of, or belonging to the same, and the reversion, and reversions, remainder, and remainders, rents, issues, and profits, of all and singular the said premises with their appurtenances, and all the estate, right, title, interest, property, claim, and demand whatsoever, of him the said W. H. of, in, and to, the said part or parcel of land and premises, and of, in, and to every part and parcel thereof, with their, and every of their appurtenances. To have and to hold," &c. And also the following deed between the same parties. "This indenture made the 4th September, 1818, between William House, of, &c., of the one part, and Mary Harvey, daughter of the said W. H. of the other part. Whereas the said W. H. did, by deed bearing date on or about the 9th July, in the year 1817, duly executed and recorded. convey or intended to convey to the said M. H. the lands and premises hereinafter described and conveyed, and there appearing to be considerable defects in the said deed, from whence doubts have arisen, whether the same be sufficient in law to convey the said land to the said M. H. as thereby intended; to correct all errors and mistakes therein, and confirm the title of the said land in her the said M. H., the said W. H. hath given this deed of confirmation. Now this indenture witnesseth, that the said W. H. as well for the causes above recited, and the natural affection and love, which he, the said W. H. hath; and beareth unto her the said M. H., as for and in consideration of the sum of one dollar, current money, to him in hand paid by the said M. H. at or before the sealing and delivering these presents, the receipt whereof he, the said W. H., doth hereby acknowledge, hath given, granted, &c. and by these presents, doth give, grant, &c. unto her, the said M. H., her heirs and assigns, all that

293 tract or parcel of land lying and * being in the county aforesaid, within the following metes and bounds, it being part of a tract of land called and known by the name of More Bad than Good; beginning for the same, at a white oak tree, standing to the westward of the house where the said W. H. now lives, marked for the end of the eighth line of a tract of land, called

The Resurvey on House's New Design, it being also at the end of the thirty-first line of the said tract of land called More Bad than Good, and running thence, &c.—describing the land by metes and bounds, courses and distances—containing 98 acres of land, more or less, together with all and singular the improvements, &c.; to have and to hold the said tract or part of a tract or parcel of land, and every part and parcel thereof, unto the said M. H. her heirs and assigns, to the only proper use and behoof of her the said Mary Harvey, her heirs and assigns forever.”

The plaintiff objected to the admissibility of the first deed from William House to Mary Harvey, and the Court sustained the objection, and refused to permit the same to be read to the jury. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, and DORSEY, JJ.

Palmer, for the appellant, contended. 1. That the Court below erred in rejecting the deed of the 9th of July, 1817, when offered in connexion with the deed of September 4th, 1818, both constituting one deed. The question then is, as to the admissibility of the first deed—if it was evidence for any purpose, the judgment must be reversed; it can be affirmed only upon the ground of its being an absolute nullity. He insisted that the deed operated as a covenant to stand seized to the use of the grantee, and that a Court of Chancery need not be resorted to for the purpose of enforcing the covenant. The grantor * could not resist this deed, and if he could not neither can John House, who claims under the same grantor. **294** *Jackson vs. Sebring*, 16 *Johns.* 524; 2 *Thos. Co. Lit.* 682, note 2; 2 *Will.* 62. After the execution of the deed, the father and daughter (grantor and grantee,) became tenants in common; its design was a family settlement, securing to the daughter her proportion of his, the grantor's estate. The deed refers to the will of the grantor, dated July 4th, 1817, in which the land it intended to convey, is described as the Cabin Farm, which is a sufficient designation. By the will, he directed his executors to do, what he himself does, by his deed of September, 1818. This last deed is not a confirmation of the former deed, but a deed of partition, giving a specific description of the property. They are not relied on, as furnishing the ground for a recovery in ejectment. The party claiming under them is in possession, and merely relies on them to defend that possession. Considering William House, a tenant in common with his daughter, the grantee, he could not convey to John, any separate portion of the land, held in common with Mary. 4 *Kent's Com.* 364; *Hammond vs. Norris*, 2 *H. & J.* 146; *Thomas vs. Turvey*, 1 *H. & G.* 435. 2. If the deed of 1817 did not in itself contain a sufficient description, it was competent to the defendant to show by the deed of 1818, that the

Cabin Farm, referred to in the first deed, contained a certain number of acres, and was sufficiently defined. *Jackson vs. Delancy*, 4 Cowen, 429, 432. That which can be rendered certain, is sufficiently certain. 4 *Cruise Dig.* 208; 1 *Thos. Coke*, 240. The first deed was to take effect after the death of the grantor, and refers to his will—if good at the time of its execution, subsequent events cannot make it bad. The first deed at the time of its execution, was certainly good as against the grantor. If he had died leaving the will referred to, the grantee could have compelled his executors to lay the land off, in conformity with the will—Chancery would have coerced them to do so. Though the deed may be * defective as such, it is still
295 good as a contract, and Chancery will compel its specific execution. *Tiernan vs. Poor*, 1 G. & J. 221; *Beal and Lynn*, 6 H. & J. 533; *Hunt vs. Rousmaniere*, 1 *Peters*, 13; 2 *Peere Wms.* 242; 1 *Eq. Cas. Abr.* 286; *Sugden Vend.* 223, 523, 527. The deed of 1818 revokes the will *pro tanto*, and effectuates that which the testator designed should be done by his executors, after his death. If a Court of Chancery would enforce the deed as a contract, it cannot be absolutely void, and when enforced, it must take effect from its date. *Browne vs. Browne*, 1 H. & J. 430.

F. A. Schley and *Wm. Schley*, for appellee,—referred to the plots in explanation of the conflicting pretensions of the parties. The defendant claims under a deed from William House to Mary Harvey, dated 9th July, 1817, and which was located by him, according to the courses and distances of a second deed from said W. H. to said M. H. dated the 4th of September, 1818. But the deed of the 9th of July, 1817, was counter-located by the plaintiff, in such manner as not to interfere with his location of his own pretensions; and as not to fall within the lines of the deed of 4th September, 1818. Thus the defendant claimed title under the deed of 9th July, 1817, and its true location was in issue, by reason of the plaintiff's counter-location. The defendant offered both the deeds at the same time, and as forming together one deed. The objection was exclusively to the prior deed. The sole question, therefore, presented by the record is, whether the deed of 9th July, 1817, was admissible in evidence, or not? They made the following points:—1. That said deed was not admissible, *per se*, as an independent instrument, either to prove title or location. 2. That it was not admissible, in connexion with the second deed, as evidence for the defendant, for any purpose.

1. The deed was not admissible *per se*. It is void for uncertainty. Every deed must comprehend sufficient certainty of the lands or tenements intended to be conveyed. * 2 *Thomas' Co. Lit.* 240. And
296 such certainty must be collected from the terms of the deed, of which the Court are to judge:—matter *in pais* cannot be resorted to, except in cases of latent ambiguity. *Carroll vs. Norwood*, 5 H. & J. 163. Where the ambiguity is patent, the deed is void, either absolutely, or except on the ground of election, according to circum-

stances. *Hammond vs. Norris*, 2 H. & J. 147; *Huntt & Parks vs. Gist*, 2 H. & J. 505; *Thomas vs. Turvey*, 1 H. & G. 438. The decisions in this Court upon cases of judicial sales, where the returns of sheriffs have been quashed for uncertainty in the description of the premises, are in point. In those cases it was held, that such certainty was necessary in a return, as would enable the officer, upon a *habere facias possessionem*, to deliver possession of the premises. *Fenwick vs. Floyd*, 1 H. & G. 172; *Clark vs. Belmear*, 1 G. & J. 448. Express certainty in the description is not necessary; if there be a reference in the description to something aliunde, a recurrence to which will establish the certainty of the premises, such demonstrable certainty will suffice. They referred to the deed to shew, that it does not contain any express certainty. The name of the tract, whereof the part intended to be conveyed is parcel, is not even given; no muniments are designated; no courses and distances mentioned. They insisted that it does not comprehend the requisite demonstrable certainty. Strictly speaking, there is but one reference; and that is to the grantor's will of 4th July, 1817, and what follows is mere recital from the will. But at the utmost, there are but four matters aliunde, by which the certainty of the premises might be established. (1.) The grantor's will. Where is that will? What was the part therein devised to Mary Harvey? No such will was offered in evidence; no such devise was located on the plots. The deed could not, therefore, have been received on the suggestion, that the defendant might have afterwards produced the will. As the devise was not located he could not offer any such evidence. *Carroll vs. Norwood*, 1 H. & J. 177. (2.) The Old Cabin Farm. This is, **297** manifestly, not given as an independent description; but is mere recital from the will, wherein the land devised to M. H. was designated as the Old Cabin Farm. But as an independent reference it cannot avail. The defendant did not locate the Old Cabin Farm, and could not, of course, have offered any evidence to show, that its boundaries agreed with his location of said deed. (3.) The part intended to be conveyed, was to be taken from that part of the grantor's land, which he had bought from Holland. The purchase from Holland is located, and consists of 254 acres. The part intended to be conveyed is only 100 acres. This was a case for election, but it was never made; or if made, such election is not located, and could not therefore be proved. It comes within the principles of *Huntt & Parks vs. Gist*, already considered. (4.) The part "intended to be conveyed" was to be laid off by the grantor's executors at his death. It was to be ascertained by the exercise of a future power. It is sufficient to say that it does not appear that William House is dead; or that he appointed executors; or that the power was ever exercised:—if exercised, as it is not located, no evidence could be received of the lines of the part laid off. The deed, therefore, in point of law, was merely void and inoperative. It could not be evidence of title; and having

no properties whereby it could be located, and there being nothing on the plots to aid it, it could not be received in support of the defendant's locations. In the case of *Hammond vs. Norris*, there was no counter-location of the defective deed. The question of title alone was in issue in that case; here location is also in issue. Where a location is made by one party, and no counter-location thereof by the adversary, the location is admitted to be true. *Hughes vs. Howard*, 3 *H. & J.* 13. In that case, therefore, the deed was properly read to the jury, in explanation of the manner of its location. But when offered to prove title, it was declared to be void for uncertainty, **298** * and not to be "a locatable deed." The decision in that case, is conclusive upon the questions in this. But it has been urged that the deed may be upheld as a covenant to stand seised to the use of Mary Harvey. To stand seised of what? The same certainty is required in such a deed, as in a deed of bargain and sale. The only distinction between a covenant to stand seised, and a technical bargain and sale, arises from the nature of the consideration, and not the form of the conveyance;—a pecuniary consideration being indispensable to the latter, whilst a merely good consideration would avail to support the former. 2 *Saund. on Uses and Trusts*, 46, 79. Both are deeds; and are construed by the same rules. Before the Statute of Uses what difference was between them? They were both considered as mere declarations of uses, operating without transmutation of possession—in the one case, on the possession of the bargainor, to raise an use in favor of the bargainee; in the other, on the possession of the covenantor, to raise an use in favor of the covenantee. In either case, livery of seisin would have made a *feoffment*, and would have operated by transmutation of possession, to vest the seisin in the bargainee or covenantee, who would have become the feoffee. The Statute of Uses, in both cases, by a legal transmutation, annexes the possession to the use. 2 *Thos. Co. Litt.* 578; 2 *Inst.* 671. But the statute can only operate a legal transmutation, where livery of seisin in fact would have made a *feoffment*. And is not certainty of the premises inseparable from the notion of livery? 2 *Thos. Co. Litt.* 334. Again:—It has been urged that the deed is good as creating a tenancy in common. This cannot be. The part "intended to be conveyed" was intended to be held by her in severalty, and not *pro indiviso*. It is only necessary to recur to the definition of a tenancy in common, to break the force of this argument. 2 *Bl. Comm.* 195; 1 *Thos. Co. Litt.* 892.

It is the peculiarity of the estate of tenants in common, that neither can tell which part is his own. As Lord Coke * says, it is *pro* **299** *indiviso*. As soon as the particular part is determined, it ceases to be a tenancy in common. It must be a holding in common of every part of the land. 2 *Black. Com.* 192; *Co. Lit.* 188 *b*. In the deed he does not convey it as an undivided part. A moiety, a third, or any other part of a tract, or any other words to shew that there is

a remaining part for him. Here he conveys it as "all that part or parcel of land as has been willed by him to her, as will more fully show by his last will and testament, bearing date, &c.; it being designated by the Old Cabin Farm." Unity of possession is the essence of this kind of estate. That is, a possession pervading the whole estate. Yet by this deed he confines her right to 100 acres, and designates these 100 acres as the Old Cabin Farm, and as the land willed to her for 100 acres, as by his will, will more fully show, &c. By the deed, called by the defendant a deed of confirmation, and offered in evidence by him, he shows that he meant to convey by the first deed a specified quantity, and by defined limits. If then the second deed is to show the nature of, and explain and confirm the first, and they are both to be received as one; there certainly can be no tenancy in common.

2. The first deed was not admissible in connection with the second. (1.) The second deed cannot avail to confirm the first. It may operate as an original deed, and as such was evidence, nor was it objected to by the plaintiff. But it cannot relate to the first deed, and make that good. A confirmation doth not create a right—it can only make sure a right *in esse*. *Confirmatio omnes supplet defectus, licet id quod actum est ab initio, non valuit*. It doth not strengthen a void estate:—*ubi donatio nulla omnino, nec valebit confirmatio*. 2 *Thos. Co. Litt.* 516. It has been admitted, however, that the second deed cannot be good as a confirmation. But it is insisted:—(2.) That it is good as a deed of partition. But this presupposes that the grantor and grantee were tenants in common. It has sufficiently been shewn that the prior deed could not create such a relation. If it did create such a relation, then it would have been evidence independent of the second deed. Its effect in evidence would have been an after inquiry.

Ross, in reply, cited 16 *Johns.* 524; 27 *Hen. VIII.* c. 10; 2 *Thos. Coke*, 682, note 2; *West vs. Biscoe*, 6 *H. & J.* 465; 1 *Dallas*, 137; 4 *Kent Com.* 364; 2 *Conn. R.* 243; 4 *Ib.* 485; 5 *Ib.* 363; 1 *Thos. Coke*, 828, *N. R.*; *Hammond vs. Norris*, 2 *H. & J.* 131; 2 *Peters*, 44.

STEPHEN, J. delivered the opinion of the Court. After referring to the evidence, the Judge said:—The sole question, therefore, which this Court is called upon to decide is, whether the first mentioned deed was legally operative and admissible, as evidence to go to the jury for the purpose for which it was offered, or in other words, whether the deed was not legally defective for uncertainty in the description of the property intended to be conveyed? The deed has reference to the will of William House, to identify the land, which it was intended to transfer to Mary Harvey; and the question therefore necessarily arises, whether the will is not equally and essentially defective in the description of the property it was intended to convey? And upon mature deliberation we think it unquestionably was. By

the will of William House, it was designated by the name of the "Old Cabin Farm, it being likewise to be taken * from that part or parcel of land the said W. H. bought of Holland, to be laid off by the said W. H's executors at his death, for 100 acres of land." The Old Cabin Farm was not located on the plots, nor was there any location of the land as laid off by the executors of W. H. according to the provisions of his will. There was, therefore, no location on the plots to which the deed offered in evidence could apply, and the principle is well settled, that no title paper can be offered in evidence unless it is located. The deed we think was defective for uncertainty. It referred to the will to ascertain the land it was intended to convey. The will did not specify with certainty or precision the land devised; it was to be laid off by W. H's executors at his death. There was no proof in the cause that the executors of W. H. ever had executed the duty or trust developed upon them by the will, and the reference by the deed to the will, does not therefore cure or remove the ambiguity. It was contended by the counsel for the appellant, that although the deed from W. H. to his daughter M. H., did not operate to convey any specific quality of land to his daughter, by reasons of its ambiguity in the description of the land intended to be conveyed, yet that it might operate as conveying an undivided interest, and make M. H. a tenant in common with W. H., and that the deed of the 4th of September, 1818, might operate as a deed of partition. But to this proposition we cannot accede. We do not think that the deed from W. H. to M. H. operated to make them tenants in common. It is an essential attribute of a tenancy in common, that there should be a unity of possession; wherever, therefore, the tenure of the estate intended to be conveyed, indicates a holding in severalty, or by particular or specific description, a tenancy in common cannot exist. 1st. *Tho. Co. Lit.* 875. "Tenants in common are they which have lands or tenements in fee simple, fee tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or * tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law, between them in common, they are called tenants in common." In this case, the 100 acres were to be laid off by executors, and the devisee was to hold them exclusively in her own possession, which provision in the will is wholly destructive of the idea of a tenancy in common, to which estate, a unity of possession is essential. Neither can the deed of the 4th of September, 1818, operate as a deed of confirmation: because it is the office and operation of such a deed, to corroborate and give legal effect, not to a void, but voidable estate. A confirmation does not strengthen a void estate; for a confirmation

may make a voidable or defeasable estate good, but cannot work upon an estate that is void in law. 1 *Cru. Dig.* 105. It was contended by one of the counsel for the appellant, that though the first deed might be defective and inoperative at law, yet that it might be available in equity as a contract, which a Court of Chancery would enforce. Admitting that Chancery will aid defective conveyances by parents making provision for children. 1 *Vernon*, 132; 1 *Fonb.* 349. Yet it must be remembered, that the parties in this cause were litigating in a Court of law, and whatever might have been the equitable rights of Mary Harvey, they could not avail her as matter of defence in the action of ejectment; nor is it believed that equity would have enforced the first deed to the prejudice of John House, who was a subsequent purchaser for valuable consideration without notice. We are also of opinion that the principle established by the case of *Hammond vs. Norris*, 2 *H. & J.* 130, is strictly applicable to the case now before this Court. In that case, the plaintiff having located on the plots, a deed from John Howard to Philip Hammond, offered in the first bill of exceptions, to read in evidence a deed bearing date the 27th of September, 1753, being a deed of bargain and sale by * way of mortgage, conveying unto Hammond all those two parcels of land being parts of a tract of land called Wood's Inclosure, and sold to the said John Howard by Joseph Wood, one parcel containing 86 acres, the other 94 acres as by deed duly made and recorded in the records of Frederick County appears; the said two parcels of land being also what the said J. Howard's dwelling plantation is made upon. In the second bill of exceptions, he then produced and offered to read in evidence the said deed from J. Howard to P. Hammond, dated the 27th of September, 1753, herein before mentioned in the first bill of exceptions, and showed that the 86 acres of land therein mentioned were located by him on the plots, beginning at the end of the 27th line of Wood's Lot, as located by him at black A, and running, &c. to the beginning. "CHASE, C. J. The deed from J. Howard to P. Hammond of the 27th September, 1753, does not sufficiently specify the land, being for 86 acres and 94 acres, parts of Wood's Inclosure, conveyed by Joseph Wood to John Howard, as appears by deed recorded in Frederick County, but the deed thus referred to, cannot be found. This deed does not define the 86 acres by any courses or distances, there is therefore, nothing in it whereby any locatable land can be conveyed, and of course passes nothing, and passing nothing, it cannot be evidence. Nothing but the deed itself, can prove the location of the land recited in the deed now offered to be read to the jury. The Court are therefore of opinion, that the deed from J. Howard to P. Hammond is not legal evidence to show title in Hammond in the 86 acres of land, part of Wood's Inclosure, as located on the plots by the plaintiff, or to support his location of the same, without producing the deed from Joseph Wood to J. Howard, to which the deed from J. Howard to

Hammond doth refer, to ascertain and identify the 86 acres intended to pass by the same, and that the deed is inoperative to pass the same, without producing that deed. The Court refuse therefore to suffer the same to be read to the jury.” This Court are of opinion that the principle involved *in that decision, is decisive of the question now before this Court, and that the judgment of Frederick County Court ought therefore to be affirmed.

Judgment affirmed.

THE STATE *vs.* LEVIN DOWELL.—December, 1831.

It is sufficiently certain in an indictment to describe the article stolen as “one hide of the value,” &c. (a)

ERROR to Calvert County Court. An indictment had been found against Dowell, by the grand jury of Calvert County, in the following words:

“The grand jurors of the State of Maryland, for Calvert County, upon their oath do present, that Levin Dowell, late of said county, yeoman, on the 10th January, 1830, with force and arms at the county aforesaid, one hide of the value of one dollar current money, and one other hide, of the value of one dollar current money, of the goods and chattels of James Kent, and Daniel Kent, then and there being found, feloniously did steal, take, and carry away, against the Act of Assembly in such case made and provided, and against the peace, government, and dignity of the State.”

Upon the plea of not guilty, there was a verdict for the State.

The defendant then moved in arrest of judgment upon the ground, 1st. That the indictment does not describe the kind of hides charged to have been stolen. 2d. That the indictment charges the stealing of two hides, and the proof in support of that allegation is, that the accused did steal an ox hide and a calf skin. The County Court sustained the motion, and arrested the judgment. The present writ of error was thereupon taken out.

311 *The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Boyle, for the State, after referring, upon the question of the certainty required in indictments, to 5 Coke, 125; *Russell on Crimes*, 1147, 1181; *Cowp. Rep.* 682; 2 *East Crown Law*, 777, 602, 616; *Archbold C. Plea*. 130; 3 *Maul. and Selw.* 539; was stopped by the Court, who

Reversed the judgment, and awarded procedendo.

(a) See Rev. Code, Art. 72, sec. 38, amended by Act of 1882, c. 84.

JOHN DIFFENDERFFER vs. WINDER *et ux.*—December, 1831.

D. in 1815, voluntarily assumed a trust over certain real property, to a part of the rents of which the complainants were entitled, and from that period until 1828, from time to time, every year, received large sums of money from the estate, which he continually employed in trade and speculation. To the bill against him for an account, he filed more than one defective answer, withholding the discovery sought for. He claimed the whole trust fund, in one answer, as belonging to his wife and children, who really owned a part; while in another, he set up an unfounded stale claim in a stranger, to a part of the fund. He endeavored in the progress of the cause to stifle the inquiry as to the use he had made of the money received, or the profits which had accrued from its use. He neither paid nor offered to pay the *c. q. t.* complainants any thing. *Held*, that under the circumstances he was liable to pay compound interest, estimated on the balance in his hands at the end of each year; and that having kept full and fair accounts of his receipts and expenditures, and in that respect faithfully discharged his duty as trustee, he had not forfeited all claim to commissions, but was entitled to half commission—5 per centum. (a)

Where the Appellate Court reverses the decree of the Court of Chancery, it exercises as it were an original equity jurisdiction, and places that decree upon the record, which the Chancellor ought to have given. Upon cross appeals, therefore, from the same decree, errors of which one party below, since the Act of 1825, could not have availed himself upon his appeal, because not excepted to, may be corrected by this Court in remodelling the Chancellor's decree upon the appeal of the other party. (b)

The Court of Appeals will direct an audit to be made, and new accounts stated, where it is necessary to enable them to pass a final decree in the cause.

* Accounts stated by the auditor of the Court of Chancery which have not been confirmed by the Chancellor, are no evidence of the truth of the facts assumed by the auditor in stating them. **312**

Where trustees act *bona fide* and with due diligence, they have always received the favor and protection of Courts of equity, and their acts are regarded with the most indulgent consideration. Where they have betrayed their trust—grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to rules of strict, if not of rigorous justice. (c)

(a) Distinguished, as to payment of compound interest in *Sindall vs. Campbell*, 7 Gill, 74, and *Raymer vs. Bryson*, 29 Md. 481. See *Ringgold vs. Ringgold*, 1 H. & G. 11, note (b). Cited, as to allowance of commissions to trustees, in *Railway Co. vs. Keighler*, 29 Md. 580. See *Ringgold vs. Ringgold*, 1 H. & G. 11, note (g).

(b) Approved in *Trust Co. vs. Winn*, 4 Md. Ch. 268.

(c) Approved in *Chase vs. Lockerman*, 11 G. & J. 208. Cf. *Gwynn vs. Dorsey*, 4 G. & J. 453.

CROSS-APPEALS from the Court of Chancery. On the 8th August, 1825, the appellees, William S. Winder, and Araminta his wife, filed the present bill against the appellant, and Amelia, Michael, and Charles R. Diffenderffer, the minor children of the appellant, charging, that in the year 1805, a certain Charles Rogers being seized of a considerable real estate in the City and County of Baltimore, duly made his last will and testament, and without revoking the same, departed this life at the close of the said year, leaving four children, to wit, Ann Martin, Mary Lee, Catharine Rogers, and Sarah Bailey, the mother of the complainant, Araminta. That the testator devised his estate to certain trustees, to hold the same upon the trusts by the will disclosed, and also devised all his real estate fronting on Baltimore and Calvert streets, except forty feet at the north, to be divided into three equal parts by the trustees, and to be by them held, to, and for, the sole and separate use of the testator's three youngest daughters, Ann, Mary and Catharine, during their natural lives, as tenants in common, free from the control of their then, or future husbands, and after their death, then in trust for the children of such daughters as tenants in common, and by said will made the following devise: "The residue of my real estate situate in the City of Baltimore, or elsewhere, it is my will and desire, that my said trustees, and the heirs of the survivor of them, hold the same in trust to and for the sole and separate use and behoof of my said three youngest daughters, Ann, Mary and Catherine, as tenants in common, without the control or interference of any future * or present husband, each to receive the rents and profits of the same, and to give receipts, either to the tenants, or my trustees, and from and immediately after the decease of each of my said three daughters, then in trust, to and for all and every of the child and children of said daughters, their heirs and assigns, as tenants in common, such child or children to have the share of its, or their parent; to wit, the one-third part of my said last mentioned premises, leaving the two-thirds to my surviving daughters, and in case of the death of two of them, then leaving the one-third to the survivor; the remaining two-thirds vesting in the issue of my deceased daughters, *per stirpes*;" and further devised, "If any of my children, to wit, Sarah Bailey, Ann Martin, Mary Lee, or Catharine Rogers, die without leaving issue at the time of their death, or if leaving issue, they die without issue before they arrive at the age of 21 years; it is my will that my trustees, and the survivor of them, &c. hold his, her, or their share or shares, if more than one, in trust, to and for all my surviving daughter or daughters; and the issue of any daughter, is to be considered as a surviving daughter, and to represent the mother or parent *per stirpes*; where any limitation in this will is made to children or daughters, my meaning is, that the same comprise their issue, that is, my grand, great-grand-children, and so *in infinitum*; and they are to take *per stirpes*, to wit, issue, to take any one of my daughter's

share, it being my intention that no one part, or share of my property, on the death of any of my daughters, shall go to the surviving sister, as long as children, or issue shall represent any of my deceased daughters," as by reference to the will exhibited with the bill appears. That the said Ann Martin and Mary Lee, have departed this life, without leaving any children or issue whatever. That the said Sarah Bailey hath departed this life, leaving the complainant Araminta, since married to the other complainant, her only child and heir-at-law. That Catharine Rogers married John Diffenderffer, (the appellant) by whom she had four children, one of whom died unmarried, and * without issue, and Amelia, Michael, and Charles **314** R. three of the defendants are her surviving children, all of whom are minors, and that Catherine, the mother is dead. That since the death of the said Ann Martin and Mary Lee, the said John Diffenderffer asserting that his children are entitled to the whole of the property mentioned in the several devises, hereinbefore stated, has taken possession of all such property, rented out the same, and received the rents and profits thereof, to a large amount, to the exclusion of the complainant, Araminta, who as the complainants charge, is entitled to one-half of the shares belonging to the said Ann Martin and Mary Lee, the children of said Diffenderffer being entitled to the other half. The bill further stated, that the trustees named in the will have refused to accept the trust, and none others have been appointed by any competent authority. That frequent applications have been made to Diffenderffer for an account of the moneys received by him, and a discovery of the property to which Ann Martin and Mary Lee were entitled under the aforesaid will, and where the same is situated; and for a fair and equal division thereof, which has been refused. The bill sought information on all these subjects; and prayed that Diffenderffer may come to a full and fair account for the rents and profits of said property, and for a division of the same, and for further relief.

The answer of the appellant admitted the death of Charles Rogers, the testator, as stated in the bill, and that complainants exhibited a true copy of his will. That he left four children as stated, and that Catharine Bailey, one of them is dead, leaving the complainant, Araminta, her only child, and heir-at-law. The marriage of the complainant is also admitted; and that Ann Martin and Mary Lee have departed this life without issue; the former on the 5th of May, 1807, and the latter on the 21st of January, 1808. That Catharine Rogers intermarried with the respondent, and that she has since died, to wit, on the 30th June, 1818, leaving four children, one of whom thereafter died, as * charged in the bill. The answer then states, that the trustees refused to accept the trust as stated, in consequence whereof, an application was made on behalf of the parties interested, to have a trustee appointed to execute the trusts of the will; that thereupon one Samuel Vincent was appointed by the **315**

Chancellor some time about the year 1806, for that purpose, who took upon himself the duties of said appointment, and continued to discharge them up to the year 1815, when from the infirmities of age and disease, he became incapable of executing them further. That Vincent from time to time, settled his accounts in the Court of Chancery, and paid over to this defendant sundry sums of money received from the said trust fund, on account of the distributive share of his wife; by which, and by an account stated by the auditor of the Court of Chancery, it will appear, that there remained a large balance due to his said wife, whilst the other parties received more than their proportions. The answer further states, that when said Vincent became incapable as before mentioned, from further fulfilling the duties of trustee, he required this defendant to take possession, and receive the rents and profits of that part of said trust estate, which belonged to his wife, and descended to her children as aforesaid. That the defendant accordingly took possession of the property on Calvert and Baltimore streets, devised as aforesaid in trust, for the benefit of the said Ann Martin and Mary Lee, and the said Catharine Rogers, (married to defendant) and also of sundry ground rents, devised in the same way, which he is advised he had a just and legal right to, by virtue of the aforesaid will, and the death of Ann Martin and Mary Lee, upon which the said estate, so taken possession of by him, descended to the said Catherine, and after her death, to her aforesaid children. That from the 16th of January, 1815, to the 28th of November, 1825, he hath received, deducting sundry disbursements, for taxes, repairs, &c. the sum of \$24,149.35½, of which he hath a particular account, ready to be produced when necessary, in the future * progress of the cause. That he did not take possession of, or receive the rents and profits, of any other of the

316 estate of the said testator, than as stated above, &c.

Upon exceptions to the above, an amended answer was filed, exhibiting a particular account of the receipts of, and expenditures by, the defendant, on account of said estate.

The infant defendants answered by their guardian, denying all knowledge of the facts stated in the bill, and putting complainants to the proof of the same.

Afterwards by consent of parties, the defendant, John Diffenderffer, at March Term, 1828, filed an amended answer, exhibiting a deed executed by Ann Martin, and Alexander Martin, her husband, dated the 8th of October, 1806, to a certain Levin P. Barnes; and a deed from the said Barnes, dated on the first day of April, then following, to a certain William Hickborn, whereby as he alleged the entail of the estate was docked, and the said Hickborn became, and was seized of an absolute estate therein in fee simple, in trust, for the sole, and separate use of the said Ann Martin; and also the last will and testament of the said Ann, duly executed, devising to certain persons therein named, the whole of her interest and estate in

the said premises, to the exclusion of the complainants, or either of them.

A commission issued to take testimony, interrogatories were filed by the complainants, to be propounded to the defendant John Diffenderffer. In reply to these he stated—that the accounts heretofore filed by him in Chancery, will show the amount, and how, when, and from whom, he received the rents and proceeds of the estate of Charles Rogers, of which he was appointed trustee by the Chancellor, he has been at all times ready, and willing to account for, and pay over the balance which may be due, upon the said trust. He has at different times during the said trust made purchases of stock in various public institutions, by many of which he has lost large sums of money. He kept a separate, and distinct account of the * rents received from said estate in his own books, though he did not make a separate deposit of them in bank, which could 317 not be done, as the greater proportion of them was received in small sums, of ten, twenty, fifty, or one hundred dollars, and occasionally larger sums; that the moneys so received were deposited with his own in bank, and drawn for in the same way; and that he had at all times, a large cash balance in his favor in bank, for which he received no interest; and that he could, and would at all times have paid on demand, any thing due to said trust estate. All accounts made out by him, against the debtors of the estate, were in the name of the heirs of Charles Rogers, expecting to account with, and pay over to them the rents so received. The respondent had been advised, and believed, that the property belonged exclusively to his own children.

BLAND, C. (March Term, 1828.) After an attentive consideration of the will of the late Charles Rogers, upon the true construction of which, this controversy entirely rests, it is my opinion that he devised the property mentioned in the complainant's bill, to his daughters for life, with remainder to their children in fee simple, and upon the death of any one daughter without children, then her share was to go to the survivors, and their children. There is nothing in this will, which shows it to have been the intention of the testator, that his daughters, or their issue, should take an estate tail only. All four of his daughters are now dead, and two of them, Ann and Mary, have left no issue, consequently the property in the proceedings mentioned must pass in two equal parts to the testator's grandchildren, the one-half part to the complainant, Araminta, as the daughter and sole heir of the late Sarah, and the other half part, to be equally divided, among Amelia, Michael, and Charles R. Diffenderffer, as the children and heirs of the late Catharine. The bill prays for a partition of the estate, and for an account of the rents and profits; these prayers will be granted. It was thereupon, * (April 7th, 1828,) adjudged, that a commission issue to make partition 318

accordingly, and the defendant was decreed to account, &c. It was further ordered, that the auditor state an account between the parties upon the proof then in the cause, or which might thereafter be introduced.

On the 8th of November, 1828, the auditor reported, that upon an examination of the proceedings it appears, that by an order passed on the 4th April, 1806, one Samuel Vincent was appointed trustee, to carry into effect the will of Charles Rogers; that he bonded, and acted as such, until 1814, when he resigned in favor of the defendant, John Diffenderffer. It does not appear that said Diffenderffer was ever formally appointed trustee, but he has been recognized as such by the Court, in several orders, and as trustee, admits that he has received rents and profits to a large amount. It also appears that said Vincent, as trustee, returned an account of his receipts and disbursements, with his vouchers, which were referred to the auditor, and on the 23d December, 1818, sundry accounts were reported, but they yet remain undisposed of—with this report five accounts were filed.

Account (A) stated according to the instructions of the trustee's solicitor, charged him with all his admitted receipts, and allowed a commission thereon of ten per cent. also all his expenses, for taxes, repairs, &c. and the sum of \$2,578.78, on the ground that an equal sum had been paid by the former trustee, to the other devisees, Ann Martin, Mary Lee, and Sarah Bailey, out of the rents and profits received by him, over and above their respective shares thereof.

Account (B) also stated in conformity with the defendant's instructions, differs from the first, only in charging the trustee with interest on the balance in his hands, at the filing of the bill; yearly rests are made, and interest allowed on the balance of principal in hand, at the end of each year to the time of taking the account.

319 * Account (C) stated according to complainant's instructions, disallows any commissions to the trustee, and credits him only with his disbursements, for repairs, taxes, &c. Yearly rests are made, and interest charged on the balances in the trustee's hands, at the end of each year.

Account (D) is stated according to the auditor's views of the justice of the case, and like account (C) makes annual rests, charging interest on the balances, and allowing the trustee a commission of ten per cent. Exceptions were reciprocally filed by the parties to these accounts.

BLAND, C. at September Term, 1829, passed the following decree:

This case standing ready for hearing on the exceptions to the auditor's report, and for final hearing on the decree to account, the solicitors of the parties were fully heard, and the proceedings read and considered. By the decree of the 7th of April, 1828, the extent

of the interests of the respective parties was determined. A partition of the real estate was directed, which has been finally made accordingly; and it was also ordered that the defendant, John Diffenderffer, render a full and true accounts of the rents and profits of the property in the proceedings mentioned, during the whole time the same has been, or may remain in his possession or under his control, and the case was sent to the auditor with directions to execute this decree to account, who has reported several statements accordingly. And the only matter now to be determined is, whether any, or which one of those statements is correct; and the amount which the defendant, John Diffenderffer, ought to be decreed to pay to each one of the other parties to this suit. The bill states that the trustees named in the will of the late Charles Rogers, expressly refused to accept the trust, and are now dead, and that no trustee to carry it into effect had been appointed by any competent authority. But the defendant, John Diffenderffer, in his answer, has referred to the record of the case in this Court, of *Sarah Rogers et al. vs.*

320
** Merryman & Smith*, on a petition filed on the 27th of February, 1806, from which it appears that by a decree in that case, passed on the same day, Nicholas Hopkins was appointed a trustee, and on his declining to act, Samuel Vincent was appointed a trustee for the purpose of carrying the will into effect, on the 4th of April, 1806, who gave bond as such, and acted for some time. That after the death of Sarah Rogers, the widow, and after the death of two of the daughters of the testator, Ann and Mary, without issue, the trustee, Vincent, made a statement of his receipts and disbursements on oath, upon which the auditor reported two statements, one shewing the balance in the trustee's hands due to the legal representatives of Charles Rogers, viz: \$2,889.47, and the other shewing the balance due to the representatives of Sarah Rogers, viz: \$227.83; which report and statements were, by order of the 12th September, 1810, confirmed, and by a subsequent order of the 15th of December, in the same year, it is said, "that since the above order of the 12th of September, a report has been made by the trustee of the matters directed therein, by which it appears that the debts of Charles Rogers had been paid, except an account of small consequence, and the executors of Sarah Rogers have informed the Court, that they wait for the sanction of the account rendered by the trustee—on this part of the case, the trustee is authorized and directed to pay to the executors of Sarah Rogers the sum reported due to her representatives, being \$227.83; as to the balance due to the heirs, the trustee is authorized and directed to pay one-fourth part thereof to Sarah Bailey, and to take her separate receipt therefor, according to the will of Charles Rogers, and one-fourth part to Catharine Diffenderffer, taking her separate receipt therefor. For the two other fourth parts, a further order will be given on the determination of the appeal in the suit mentioned in the report." Some years after which, the trus-

tee, Vincent, in a letter dated on the 23d of November, 1814, addressed to the Chancellor, says, "I inform you of my resignation of the * trust in the estate of the late Charles Rogers, and have given

321 it into the hands of Mr. John Diffenderffer, one of the heirs-at-law." There does not appear to have been any order passed on this resignation. But on an application, dated on the 20th of December following, made by John Diffenderffer, in which among other things, he says, "on examining the accounts of Mr. Samuel Vincent, trustee of the late Charles Rogers' estate, I find that he has charged a considerable sum of money to Sarah Bailey, Ann Martin, and Mary Lee; it appears to me by the will of the late Charles Rogers, they were not to receive, or entitled to any, till his debts were paid, which was completed on the 9th of April, 1808." Upon which, in an order of the 25th of March, 1815, it is said, "on the application of John Diffenderffer, who married one of the heirs, and on the resignation of Samuel Vincent, the trustee, the Chancellor has examined the former proceedings. Before any further order can be made, it will be necessary for him to be furnished with a transcript of the proceedings in the suits by Mrs. Bailey and Mrs. Diffenderffer, which were carried to the Court of Appeals, as mentioned in the report of Samuel Vincent." And by an order of the 8th of July, 1816, it is said—"It being represented that there is an error in the report as to the suits in the Court of Appeals, mentioned in the order of the 25th of March, 1815, the auditor may proceed to examine the reports and vouchers, without waiting for the transcripts, and report thereon, giving notice to the former and present trustee." From all which I take it to have been finally settled by the judgment of the Court, in the case of *Sarah Rogers and others vs. Merryman and Smith*, to which the widow and the four daughters of the late Charles Rogers were all parties; first, that the debts of the testator had been all properly and correctly paid by the late trustee, Vincent, and that a share of the surplus, left after their payment, having been ordered to be paid to Oatharine Diffenderffer, who had been a party to that suit before

322 her marriage, is conclusive upon her and those * claiming under her. Because so long as those orders of the 12th of September, and 15th of December, 1810, remain in full force (and they are not now revisable in any way,) she, nor any one claiming under her cannot be permitted in any way to question the correctness of the manner in which the debts of the late Charles Rogers were paid, which has been so distinctly noticed, considered and confirmed by those judgments of the Court. And in the next place, that it has been finally determined by the judgment of this Court, as indicated by the orders of the 25th of March, 1815, and the 8th of July, 1816, that this defendant, John Diffenderffer, was to be considered thenceforward as the trustee, for the execution of the will of the late Charles Rogers; and that he had succeeded to that trust under the authority of this Court, immediately after the resignation of Samuel

Vincent, on the 23d of November, 1814. These positions which have been established in that case appear to me to furnish a very satisfactory answer to the claim of the representatives of the late Catharine, to be substituted for, and allowed to take the place of the creditors of the late Charles Rogers, on the ground of their having been improperly paid with their funds, and upon that ground to have certain sums withheld for their use from the distribution now about to be made; and also to the objection that John Diffenderffer is here claiming only as the natural guardian of his own children, and in opposition to the plaintiffs; since those proceedings shew that he stands here as a trustee, constituted by the authority of this Court, for the benefit of all the devisees under the will of the late Charles Rogers.

But passing over all the proceedings and final adjudications in that case of *Rogers and others vs. Merryman and Smith*, let us return to the decree in this case of the 7th of April, 1828, by which, the defendant, John Diffenderffer, has been called upon to account for the rents and profits for the whole time the property has been in his possession, or may remain in his possession. The statements reported by the auditor, and the exceptions of the parties to those
 * statements, present two distinct subjects for the considera- **323**
 tion of the Court. First—the claims and pretensions of the representatives of the late Catharine; and secondly, the allowances and liabilities of this defendant, John Diffenderffer. It has been urged that the debts of the late Charles Rogers were paid contrary to the directions of his will by the trustee, Vincent, out of rents and profits which ought to have gone to the late Catharine; and consequently, that she, or her representatives, to the extent of the rents and profits to which she was entitled, and which have been so misapplied, ought now to be allowed to take the place of those creditors, as against those funds in the hands of this trustee, and which are now about to be distributed. This stand is taken upon the ground of substitution, and it can only be maintained by means of those principles, by which a surety, or one who has been placed in the condition of a surety, is allowed to take the place of the creditor against the principal debtor; or by the help of those principles by which securities or assets are marshaled, so as to satisfy all, or to leave the loss fall where it must rest, according to the positive rules of law, or by the aid of the general principles of equity, arising out of some fraud or injustice practised or participated in by the plaintiffs, or those under whom they claim. It is a well settled general rule, that no one can be allowed to intrude himself upon another as his surety; and, therefore, if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he cannot take the place of the creditor, or in any way recover the money so paid, of the debtor. Because the law does not permit one man thus officiously, and without solicitation, to intermeddle with the affairs of another.

Stokes vs. Lewis, 1 T. R. 20. The only exception to this general rule is where, on a bill of exchange being dishonored, a third person, not a party to it, may pay it for the honor of the drawer, or any of the endorsers—and the reason of allowing this exception is, that it induces the friends of the drawer or endorsers to render * them

324 this service, and by that means preserve the honor of commerce, and the credit of the trader. *Chitty on Bills*, 164. But where one by express contract becomes bound as a surety for the payment of the debt of another, or as an insurer against loss, then, if the surety or insurer pays the whole debt, or reimburses the loser, he thereby entitles himself to demand a full assignment, or subrogation of all the securities of the creditor, or insured, and has a right in all respects to be substituted for the creditor or insured, so as to enable him to obtain reimbursement from his principal. *Poth. Ob. p. 2, ch. 6, Art. 4*; *Coop. Inst.* 612, 420; *Randall vs. Cochran*, 1 Ves. Sr. 99. This right of a surety to a certain extent has been affirmed by our Act of 1763, ch. 23, sec. 8. And this Court has so entirely approved of the doctrine, as to allow the surety who had paid the whole purchase money to have the benefit of the equitable lien of the vendor. *Melay vs. Cooper*, 13th Feb. 1804; and also to allow a surety on a custom-house bond, who had paid the whole debt, to take the place of the government, and thus to secure to himself the high and overruling preference to which such a creditor is entitled. *Mickle vs. Taylor*, 1806. These principles in regard to those who stand properly in the relation to each other, of principal debtor and surety, have been extended for the benefit of an executor or administrator, who may have been induced through mistake to pay the debts of the deceased beyond the amount of the assets which came to his hands, in which case he has always been allowed in this Court, as in England, to take the place of the creditor, and obtain reimbursement out of the real assets of the deceased. And if the debt so overpaid, was on a judgment against the deceased, operating as a subsisting lien upon his realty, the executor or administrator is permitted to take the place of such judgment creditor, and to have a preference in the distribution of the real assets over creditors of inferior grade. *Street vs. Cook*, 1809; *Robinson vs. Tonge*, 3 P. Will. 400.

This doctrine of substitution embraces only those cases where there is a principal debtor, and a surety by express * contract;

325 or where for the benefit of commerce a man is allowed voluntarily to place himself in the condition of a surety; or where he had by mistake, as in the case of an executor, made payment as if it had stood in that situation. Now before any of the principles on this subject can be brought to bear upon the case under consideration, it must appear that the plaintiffs, Araminta, or those under whom she claims, were the principal debtors, or that Catharine, or those claiming under her were their sureties. And that those claiming under Catharine were now here asking to be reimbursed as such out of the

funds of their principal now in the hands of the Court. But the assumption of any such statement would be in direct opposition to all the proofs in the case. Vincent was a trustee, appointed by this Court for the benefit of all concerned in the estate of the late Charles Rogers, and if he misapplied the rents and profits, which came to his hands, he alone is responsible. If this Court were now to make good to Catharine's representatives any amount of the rents and profits which had been misapplied by Vincent to their prejudice, out of the proportion of the funds now about to be distributed, to which the plaintiff, Araminta, is entitled, it would be in effect, to treat her as the principal debtor, for whose benefit among others, Vincent was not merely a trustee, subject only to the order of this Court, but who was in fact her own proper agent; or it would be to consider Araminta as the surety of the trustee, Vincent. But there is nothing in the case to warrant the placing of Araminta in any such condition of responsibility; and therefore the representatives of the late Catharine cannot sustain themselves, in the stand they have taken, by any principle derivable from the case of a principal debtor, and surety.

But the representatives of the late Catharine insist on having the securities, or these assets now about to be distributed, so marshaled, as to reimburse them to the amount of their share of the rents and profits, which had been misapplied by the former trustee, Vincent. The marshaling * of securities is only made where the debt is so secured, as to give the creditor the means of obtaining 326 payment out of two funds, and other creditors can reach only one of them. In such case the Court will compel the creditor who holds the more comprehensive security, to obtain payment as far as practicable, out of the fund which the other creditors cannot reach. So as to leave the other fund to be distributed among the creditors holding inferior securities. 1 *Mad. Ch.* 250. But there is no sort of analogy between the case of creditors, whose securities may be thus marshaled for the benefit of all, and without injury to any, and the case now under consideration. The plaintiff, Araminta, and the representatives of the late Catharine, stand precisely in the same situation; not as creditors seeking payment by way of preference, or otherwise, from the assets of a debtor; but claiming the distribution of a fund to which they are equally entitled. Marshaling of assets respects two different funds, and two different sets of parties, where one set can resort to either fund, the other to only one. As where there are real and personal assets, and judgment, and simple contract creditors, the real assets will be applied to the satisfaction of the judgment creditors, so as to leave the personalty to satisfy the debts due by simple contract. 1 *Mad. Ch.* 615. But here there is but one fund, and one set of claimants, who all deduce their titles from the same fountain. There is then nothing to be drawn from the principles of equity, in relation to the marshaling of securities,

or of assets, which can in any manner aid the representatives of the late Catharine, in maintaining the stand they have taken. It has, however, been argued, that the amount misapplied by the trustee, Vincent, came to the use of those under whom Araminta claims, and therefore that it ought to be deducted from the share, now about to be awarded to her. If it has been shown that Vincent had fraudulently misapplied the funds, and that Araminta, or those under whom she claims had participated in the fraud; or that Vincent had paid

327 money properly belonging to the * late Catharine, or her representatives, to Araminta, or those under whom she claims, who had received it, knowing it to be such, then there would have been a strong equitable ground, for deducting the amount so received, for the benefit of the representatives of the late Catharine, from the amount now about to be awarded to Araminta. But there is no proof whatever, of any fraud in Vincent, or of any participation in it by Araminta, or those under whom she claims, or of their having received any sum of money, knowing it to be the money of the late Catharine, or that it was money to which they were not justly entitled. Upon the whole, therefore, I am of opinion that no deduction whatever, can be made from the share to which the plaintiff, Araminta, is entitled, because of any misapplication of the rents and profits, in payment of the debts of the late Charles Rogers, or on account of any other misapplication of them by the former trustee, Samuel Vincent.

Having thus disposed of the claims of the representatives of the late Catharine, it only remains to determine the extent of the allowances and liabilities of the defendant, John Diffenderffer. It has been argued on his behalf, that he cannot be considered as a trustee, because he took possession of this property in no other character than as the natural guardian of his children. Admitting that he did so, he himself states, that he held their right under the will of their grandfather, and so far according to his own showing, he took possession of this property, in the character of a trustee; and as such he undertook at his peril, with the title deeds of his children before him, to claim and hold on their behalf, a much larger interest than that which belonged to them. He had thus confessedly assumed no higher character, than that of trustee for those who had the right, and now that it clearly appears, and has been determined by the decree of this Court, that the whole right was not in his children, he certainly cannot be allowed to assume a new character, and to retain rents and profits, which he does not pretend to have received as his own, but for the * use of others, who it has been determined

328 have no right to them, and who cannot be allowed to receive them, or be held accountable for them. The decree of the 7th April, 1828, is however, conclusive upon this subject. Under that decree he has been called upon to account for the benefit of those, the extent of whose interests has been determined by it. But it appears from

all the proceedings, that he has had in all respects, as complicated and troublesome an estate to deal with, as ever was committed to the management of an executor or administrator. His receipts have been very numerous, many of them small, and the collections and disbursements, it is evident, must have been attended with much trouble, and therefore, upon every principle of analogy, (apart from considering him as the successor of Vincent, to whom ten per cent. had been allowed,) I am of opinion that ten per cent. commission is a reasonable compensation, and I shall therefore ratify the statement of the auditor which makes that allowance.

It is contended on behalf of John Diffenderffer, that he is not chargeable with interest at all, while on the other hand, compound interest is claimed of him. Legal interest is the measure of damages, which the law allows in all cases for the detention of money, which the holder is made to pay, where he is in any default in not paying or applying the money in his hands, as he was bound to do. 2 *Fonb.* 423. The general rule is, however, that interest is not given upon interest; and therefore in this Court when interest is allowed, it is computed by the auditor, from the time the money became due, up to the time of stating the account, and the decree is made for the whole amount with interest only on the principal sum, from that time till paid; by which mode of computation and decree, compound interest is excluded, and this appears to be the rule in Virginia. *Shepard's Ex. vs. Stark et ux.* 3 *Munf.* 41.

It has long been the established course of this Court, according to the rule laid down by the Court of Appeals, in taking an account of rents and profits, to charge the party * with interest thereon, from the respective times they were received, *Davis vs. Walsh*, 329 2 *H. & J.* 329. In this case, one of the accounts of rents and profits, has been stated with annual rests, at the instance of the plaintiffs, and the statement has not been objected to. It is more favorable to the defendant, John Diffenderffer, than to charge him with interest according to the rule of the Court, from the time each sum was received, and therefore the computation of interest from the rest, will in this case be approved.

But it is objected, that interest should not be charged on the interest computed as a portion of the balances, at each of those rests. From all that has been said upon this subject, I take it that interest upon interest, or compound interest, may be charged in three kinds of cases; first, where with the knowledge and permission of the debtor, his whole debt, principal and interest, has been paid by a third person, or his surety, because as to such third person or surety, the interest is the same as the principal sum lent. 2 *Fonb.* 438. Secondly, where a trustee or holder of money has been directed, and undertakes to invest the sum placed in his hands in a way to make it productive, and fails or refuses to do so, he shall be charged with compound interest. As where a trustee who had been appointed by

a decree of this Court to make sale of certain real estate, was ordered to invest the proceeds of sale, then in his hands in bank stock, and that he should in like manner invest the dividends arising from such investment; and on his failing and refusing to do so, the auditor was directed to state an account, charging him with interest, which he was ordered to bring into Court, with interest on the interest so charged, until brought in, which order was, upon an appeal, affirmed.

Brewer vs. Hanson, 1 H. & G. 12. And thirdly, where a trustee has received rents and profits, which he should have applied so as to be productive, or towards the maintenance of devisees, but failing or refusing to do so, retains and uses the money as his own, in a manner to derive profit from it, there also, he shall be charged with

330 * the whole profits he has made from the use of it, or on his failing clearly to shew what those profits were, it will be presumed, that the annual amount of interest has yielded him interest, and he shall be charged with interest thereon accordingly, considering each year's interest as an addition to the capital sum lent or withheld.

The equity of this last rule is founded upon the fact of the beneficial application of the money to the trustee's own use, in violation of his trust, and to the prejudice of the *cestui que trust*, and therefore it must appear, that the nature of the trust required the trustee to make the funds which came to his hands productive as soon, and to as large an amount, as practicable, in the mode prescribed, or in some other reasonable way at his discretion; or that he was required to apply them to the maintenance or education of the *cestui que trust*; and it must also appear that he not only failed to do so, but applied the money to his own use, or put it to hazard in a manner in which he did, or might have derived a profit from it. That the trustee was required to invest, or make a beneficial application of the money, may be shown by the terms in which the trust was created. But whether he has applied it to his own use or not, must be shown by proof. Whether the pecuniary ability of the trustee was such as to enable him to pay at any time when called on, is a matter of no consequence, as regards the question of interest. The making of a deposit of this money at a bank as his own, or making purchases with it, or using it in the course of his trade, has been deemed sufficient evidence of his deriving such a profit from it, as to authorize the Court to charge him with interest upon each annual amount of interest. In the case under consideration, it very satisfactorily appears to have been the duty of the defendant, John Diffenderffer, to have applied the rents and profits received by him, for the benefit of all the devisees of the late Charles Rogers, and that instead of doing so, he deposited them as received, in bank as his own, drew them

331 out, made purchases, and used them for his own use and * benefit exclusively. What advantages he derived from those rents and profits, thus mingled with his own money, from the

time of their being deposited in bank, has not been shown, but such a course of management must have been very beneficial to himself, and greatly injurious to the devisees. Such a course of conduct by any one, standing as this defendant, John Diffenderffer did, bound to make the funds received by him productive, or constantly useful to those entitled to them, cannot be tolerated by this Court. I am therefore of opinion, that he has been correctly charged with interest on the whole amount, including principal and interest, found to be in his hands at each rest. *Newton vs. Bennett*, 1 Bro. Ch. R. 359; *Roche vs. Hart*, 11 Ves. 59; *Raphael vs. Bæhm*, 1 b. 92; *Raphael vs. Bæhm*, 13 Ves. 408; *Raphael vs. Bæhm*, 1 b. 591; *Ringgold vs. Ringgold*, 1 H. & G. 12; *State of Connecticut vs. Jackson*, 1 Johns. C. 14; *Schiefflin vs. Stewart*, 1 b. 624.

Decreed, that statement (D) be ratified and confirmed, and the others rejected—and that John Diffenderffer pay unto the plaintiffs, and to each of the other parties, their costs.

From this decree both parties appealed to this Court.

The cause came on to be argued upon the cross-appeals before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Dulany, for the appellant, (Diffenderffer,) contended, 1. That under the circumstances of the case, Diffenderffer was not chargeable with compound interest,—he took possession of the property, believing it to belong to his wife and children. The will does not direct the trust fund to be invested for the purpose of accumulation; nor is there any express declaration that the property was given for the maintenance of the *cestuis que trust*. There are but two cases in which compound interest was ever charged. In the one, the charge was made upon the ground of fraud; in * the other, upon the fact, that the trustee had used the funds for his own benefit, 332 the rule being, that an executor or trustee shall make no profit to himself from the estate in his hands. In *Schiefflin vs. Stewart*, 1 Johns. C. R. 623, Chancellor Kent infers that compound interest has been charged in some English cases, because rests were taken, though such is not necessarily the case. A mere misapplication of funds by an executor, will not subject him to compound interest; he can only be so charged upon the ground of profit, and proof of such profits must be adduced. It is not sufficient that the executor is silent as to the extent of his profits; there must be actual proof that he has made profits equal to compound interest before he can be charged at that rate. This principle is recognized in *Ringgold vs. Ringgold*, 1 H. & G. 12—and also in *Tibbs vs. Carpenter*, 1 Madd. Rep. 162; 1 Chitty Dig. 548; *Earl of Hardwick vs. Vernon*, 14 Ves. 504; *Raphael vs. Bæhm*, 13 Ves. 411; *Bates vs. Scales*, 12 Ib. 402.

2. But Diffenderffer is not chargeable with interest at all. He took possession of the property, under the impression that it belonged exclusively to his own children—his answer and the proofs,

show this clearly. Defendant was acting under the influence of an honest mistake, into which any man of ordinary prudence might have fallen, and therefore he should not be made to pay even simple interest, which is charged upon the ground of negligence. *Bruere vs. Pemberton*, 12 Ves. 390; 2 *Chitty Dig.* 1311; 3 *Atk.* 444; *Franklin vs. Green*, 2 Vern. 137; *Attorney-General vs. Corporation of Exeter*, 2 Rus. 45; *Attorney-General vs. Dean and Canons of Christ Church*, 2 Rus. 321. All the defendant is bound to do in such a case, is to refund the money when the mistake is discovered. *Brisbane vs. Dacres*, 1 Serg. and Low. 50, 51; *Smith vs. Cumberland*, 2 Ves. Jr. 698; *Methodist Esp. Ch. vs. Jacques*, 3 Johns. Ch. 78, 79; *Squire vs. Dean*, 4 Bro. Ch. R. 326; 1 *Atk.* 269; *Powell vs. Hankey and Cox*, 2 P. Wms. 82, 83.

Johnson, for the appellees, (Winder and wife,) referred to *Bank vs. Seton*, 1 Peters, 309; *Ringgold vs. Ringgold*, 1 H. & G. 12; *Shiefflin vs. Stewart*, 1 Johns. Ch. 620, 625; *Raphael vs. Boehm*, 11 Ves. 92; *Darne vs. Catlett*, 6 H. & J. 482; *Walker vs. Woodward*, 1 Russell, 107; *Stearns vs. Brown*, 1 Pick. 538; *Biglow's Dig.* 388; *Newson vs. Douglass*, 7 H. & J. 417; *State vs. Fridge*, 3 G. & J. 103; *Butler vs. Butler*, 3 *Atk.* 60; *Gist vs. Cockey*, 7 H. & J. 134.

Taney, (Attorney-General U. S.) in reply, referred to *Tibbs vs. Carpenter*, 1 and 2 Madd. 162, 167; 1 *Chitty Dig.* 511; 2 P. Wms. 82; 3 *Atk.* 60.

340 *DORSEY, J. delivered the opinion of the Court. In disposing of the first point on which a reversal of the decree of the Chancellor has been urged, it is unnecessary for this Court to consider, whether the credit insisted on by appellant, of \$2,578.77, alleged to have been paid by the former trustee, (in satisfaction of the debts due by Charles Rogers,) out of that portion of the trust fund to which Mrs. Diffenderffer was entitled, ought not to have been discharged by the proceeds of the trust estate, on which those debts were conditionally a lien, accruing before the death of Mrs. Bailey; because it does not appear by the record before us, or any of the proceedings which it refers to, and makes evidence, that the personal estate of the testator was insufficient for the payment of his debts. It has been stated in the argument that such insufficiency is established by the auditor's statement of the accounts, of the former trustee, made in the year 1818. But to these accounts, no such operation can be given; having never received the Chancellor's confirmation, they are no evidence of the facts they are relied on to prove. This credit therefore was properly rejected.

In discussing the question of interest, it has been strongly contended, that no such charge ought to be made, because Diffenderffer came into possession of the trust property, as the allotment of his wife, under a division of Charles Rogers' estate, made in pursuance of his last will and testament, by Samuel Vincent, the former trustee,

without a knowledge of any other persons being entitled or claiming title to any part thereof, and that the first intimation * of the kind which he received, was the filing of the bill in Chancery, 341 which is now before us. What would be Mr. Diffenderffer's rights in such a state of facts, we are not required to determine. He stands not in that predicament before us. It is manifest that Samuel Vincent never did make any division under Charles Rogers' will of the real estate devised to Mrs. Lee, Mrs. Martin, and Mrs. Diffenderffer, the only property whereof a division was directed :—that everything done by Hands, and now relied on, as proof of such division, was to point out to Diffenderffer, at the time he took possession of the trust property, the forty feet lot on Calvert street, devised in severalty to Mrs. Bailey. That so far from being in utter ignorance of the rights or claims of the appellees, until their bill was filed in 1825, he was fully and distinctly notified thereof, by the auditor's statements in 1818, made under his own eye, and as well, at his instance, as at that of the former trustee. Had he then believed as he now alleges, that his wife and children were entitled to the whole of the property confided to his charge, what would have been his course with regard to the auditor's accounts? It is so clearly pointed out both by his duty and his interest, that what it would have been, cannot be the subject of a momentary doubt. He would have caused exceptions to be filed, and the rights of the parties interested to be definitively settled. His failure to have done this, cannot be otherwise regarded, than as a recognition of the title of the appellees. He has therefore, upon the grounds upon which he has asked it, no claims to lenity at the hands of this Court.

Where trustees act *bona fide*, and with due diligence, they have always received the favor and protection of Courts of equity; their acts have been regarded with the most indulgent consideration. But on the other hand, where they have betrayed their trust; where they have grossly violated their duty; where they have been guilty of unreasonable negligence, they forfeit all claims to the favor and protection of the Court. Their acts are inspected with 342 * the severest scrutiny, and they are dealt with according to rules of strict, if not of rigorous justice. This course of proceeding is productive of the most beneficial consequences, and is founded on the soundest principles of policy. It is the surest, perhaps the only means of securing the fidelity, vigilance and integrity of those, to whose hands are committed the interests of the weakest, and most unprotected portion of the community.

It was held in England, even in the days of Lord Hardwicke, that an executor was not chargeable with interest who had used for his own benefit, money belonging to the estate of his testator. Subsequently a more just and equitable principle was adopted. It was determined that an executor or trustee ought not to derive any advantage to himself from the trust property; and that if he used it as

his own, or was guilty of *crassa negligentia* in not paying it over to, or investing it for the benefit of the *cestuis que trust*, that he should be charged with the annual interest of four per cent.; that being the established interest of the Court of Chancery. At a subsequent period, it being found that these abuses by fiduciary agents still continued, and that justice was not extended to *cestuis que trust*, by the rule already established, the Court went a step further, and decided, that where an executor or trustee used the trust fund, and refused to render an account of the profits, that he should pay an interest of five per cent.; that being the greatest annual interest which the law allowed, and being the presumed amount of profits, to the whole of which, if ascertained, the *cestui que trust* was entitled. At a still later period, a decree was passed, (sanctioned by the opinion of at least three Lord Chancellors) in *Raphael vs. Boehme*, reported in 11 and 13 Ves. by which not only five per cent. was allowed, but compound interest also, against an executor who had neglected, as directed by the will, to invest money with the interest accruing thereon by way of accumulation, for the benefit of the children of the testator. 'Tis true, that the decision in that case, was made as depend-

343 ing on the peculiar *provisions of the will, under which the executor acted. But it is equally true, that there was nothing in that will enjoined on the executor, which the law does not impose on him as a duty, without any testamentary injunction on the subject, where money belonging to the deceased's estate unnecessarily, and for an unreasonable time, remains in his hands. And it requires more than an ordinary degree of astuteness, to discern the distinction in a moral point of view, or in the eyes of a Court of conscience, between the acts of him, who violates the duties required of him by a testament or deed, and him who in regard to the same subject-matter, violates the same duties imperatively imposed on him by the established principles of law. But the appellant here, is not even entitled to the benefit of this distinction, if any there be, because, like the executor in *Raphael vs. Boehm*, his duties are enjoined on him by the same authority under which he derives his powers.

In what has been said respecting the legal obligation of investment by executors or trustees, in whose hands large sums have, without any reasonable excuse therefor, been suffered to remain, we do not mean to say, that compound interest is the indemnity to be made for such negligence. The current of English decisions is against it, and the question is not now before us for adjudication. It is hardly necessary to say that Mr. Diffenderffer, by his own acts, and the recognition of his agency by the Court of Chancery, stands precisely in the same attitude in which he would have stood, had he been a trustee regularly constituted by a decree of that Court. The doctrine of *Raphael vs. Boehm* has been elaborately investigated, and learnedly discussed in New York by that most distinguished jurist, Chancellor Kent, and has been adopted to its fullest extent in the case of *Schiefflin*

vs. *Stewart*, 1 *Johns. Ch. R.* 620, where no directions for investment or accumulation are to be found. The allowance of compound interest prevails in like manner in South Carolina, as will appear by *Wright vs. Wright*, 2 *McCord*, 185, where two cases are referred * to, as having previously decided the same question, viz: *Bowles and Wife vs. Drayton*, 1 *Desaus.* 489, and *Edwards vs. McMorris, Harper's Eq. Rep.* 224. In Massachusetts also, the computation of interest is made on the same principles, as is shown by the case of *Robbins vs. Haywood*, 1 *Pick. Rep.* 528, in which, where large sums of money had come into the hands of a guardian, and no account had been rendered for many years, there being rents from real estate and income from public stocks periodically received, it was ordered that an account be settled with a rest for every year, including principal and interest; and the balance thus struck, carried forward, to be again on interest, whenever the sum should be so large, that a trustee, acting faithfully and discreetly, would put that sum into a productive state.

Do the facts in this cause present Mr. Diffenderffer's conduct as a trustee, in a more favorable aspect, than that in which appeared the conduct of the several defendants in the authorities referred to? Such a comparison he can have no motive to invite. In *Raphael vs. Boehm*, the testator died in 1791. The bill was filed against his executor in 1794, so that the funds were in the executor's hands about three years; and it is not shown that he ever used them for his own benefit. Within three months after filing the bill against him, he obtained an order for that purpose, and brought into the Court of Chancery the principal part of the money he had received; and in his answer, after alleging payment of the debts of the deceased, and for the maintenance and education of his wards, he stated that he was ready to pay the balance, and interest for the testator's money which he had from time to time in his hands, as the Court should direct. Contrast this with the conduct of Mr. Diffenderffer. He assumed the trust in 1815, and from that time until 1828, he had from time to time, every year received large sums of money, which he continually employed in trade and speculation. He filed more than one defective answer, withholding from the complainants, the discovery * they sought. He claimed the whole trust fund as belonging to his wife and children, and endeavored by all the means in his power to stifle the inquiry as to the use he had made of the money received, or the profits which had accrued from its use. After the present litigation had continued nearly three years, he filed a supplemental answer, setting up an unfounded stale claim in a stranger, to one-third of the trust fund; thus seeking to defeat the just rights not only of the appellees, but of his own children. From the year 1815 to the present day, it does not appear that he ever paid or offered to pay, to any of the *cestuis que trust*, one dollar of the \$35,373.48, which he received before the 2d of August, 1828, being

the income of the original trust estate. In *Schiefflin vs. Stewart*, the executor himself filed the bill, praying that his accounts might be settled, and stating that he was desirous of paying over the residue to the children of the deceased, or their guardian. It cannot be necessary to draw the strong lines of discrimination between the case at bar, and the cases cited, nor further to prosecute this unpleasant comparison. The interests of the appellant certainly do not urge it.

Is it unjust or unlawful to charge the appellant with compound interest, under the peculiar circumstances of this case? It is a rule of equity, founded as well on principles of natural justice, as of sound policy, and now too well settled to be controverted, that profits made by an executor, or trustee, by the use of the trust fund, belong to the *cestui qui trust*; and that if an account of such profits be withheld, that interest shall be allowed as an equivalent therefor. What was the trust fund used by Diffenderffer, in the year 1815? The amount received from the trust estate during that year. Of what consisted the trust fund used in 1816? The receipts from the trust estate in 1815 and 1816, and the profits made in 1815. Can a reason be assigned why these profits, thus used by the trustee as so much capital, should not bear interest in the same manner, as any other part of the trust fund enjoyed in the same way? Ought the trustee

346 * to have the beneficial use of these profits for sixteen years, and pay no interest therefor? This advantage he will unquestionably have enjoyed, if charged with the payment of simple interest only. Justice cannot be administered to the *cestui qui trust*, their clear equitable rights cannot be sustained, but by allowing them interest on their profits used by the trustee. And this is the compound interest for which, under the decree of the Chancellor, the trustee hath been made answerable. If the appellant be let off with the payment of simple interest, it would be offering to fiduciaries, a premium for infidelity. It would in effect be a decree of this Court, giving to the trustee several thousand dollars, in addition to his commissions, of the property of the *cestuis qui trust*, as a reward of anything, rather than a faithful execution of the duties of his trust.

It may also be remarked, that the established interest of the Court of Chancery in Maryland, is six per cent.; in allowing compound interest thereon, (unless the delinquency be of at least twelve years continuance, nay even in the case now before us,) the same additional relief is not obtained by the *cestui qui trust*, that is granted in the familiar cases to be found in the modern Chancery Reports of England, where the inflamed interest of five per cent. is exacted of executors or trustees, who abuse their trusts. And we by no means go to the length to which *Raphael vs. Boehm* has been carried, where five per cent. has been charged, and interest compounded at the same rate. If, in no case, compound interest is to be exacted, you uproot the settled principle of equity, that all gains from the use of the trust fund shall enure to the benefit of the *cestui qui trust*; and you present the strange anomaly in the law, that every shade of

delinquency, corruption or misconduct of a trustee, no matter how various its consequences may be to the interests of the *cestui que trust*, is visited with the same measure of retribution. If in England and New York, where trustees are agents, serving gratuitously, it be deemed equitable for some delinquencies to subject them to the payment * of compound interest, ought it to be looked on as a measure of severity, that the same rule should prevail in Maryland, where trustees, by way of commission, are liberally compensated for all the services they render? But this question of compound interest is not now, for the first time, submitted to the consideration of this tribunal. In *Darne vs. Catlett*, 6 H. & J. 482, where the decree of the Chancellor had given compound interest, this Court said, that they could not "concur with the Chancellor in the allowance of compound interest. It is neither charged nor proved, that the executors had appropriated any of the bequest, or of the proceeds thereof, to their own use, or employed them in their own business, or in any way made any profit or gain from them, or in any manner subjected them to hazard." The necessary inference from which is, that if these facts had appeared, it would have been deemed a fit case for compound interest. The principle is still more distinctly affirmed in *Ringgold vs. Ringgold*, 1 H. & G. 79, 80, where this Court thus express themselves: "Where the trustee is directed to invest funds, and to reinvest the dividends; or in other words, where the trust directs an accumulation, and the trustee has used the funds, compound interest will be allowed, as was done in the case of *Raphael vs. Boehm*, 11 Ves. 92, 108, 109, and *S. C.* 13 Ves. 407, 590—or where he has used the trust money, or employed it in his trade or business, he shall be charged in the same manner, as was decreed in *Schiefflin vs. Stewart and others*, 1 Johns. Ch. R. 620. The grounds of this allowance, as is apparent from these cases, is founded on the gain or presumed gain of the trustees, and that the *cestui que trust* may be indemnified by the efforts of the Court in this way, to reach their profits or presumed profits." Upon principle, therefore, as well as authority, so far as the appeal of the appellant is concerned, we affirm the decree of the Chancellor.

On the appeal taken in this case by Winder and wife, we cannot sustain the decree of the Chancellor. It gives to * the trustee a commission of ten per cent. which is the full allowance that ought to have been made to him, had his conduct been marked by a strict performance of the duties he had assumed. But this is very far from being the posture in which he appears before us. It is the duty of a Court of equity, in the distribution of its favors, to discriminate between those who violate their duty, and abuse their trust, and those who perform it with skill and fidelity. To the latter a full commission is cheerfully bestowed; to the former half that amount is reluctantly granted. Mr. Diffenderffer having kept full and fair accounts of his receipts and expenditures, and in that

respect faithfully discharged his duty as trustee, we do not think he has forfeited all claim to commissions, as he otherwise would have done. We reverse, therefore, the decree of the Chancellor on the appeal by Winder and wife, on the ground that but five, instead of ten per cent. commission, ought to have been allowed to the trustee.

Upon this reversal, we are called on to exercise, as it were, an original equity jurisdiction—to give that decree on the record before us, which the Chancellor ought to have given. Whilst relieving the appellant, we must do justice to the appellee. If, therefore, by the decision of the Chancery Court, any injustice has been done to him, in remodeling the decree we must extend to him that relief, on which his equities authorize him to insist. That an error to the prejudice of the appellee, John Diffenderffer, has been inadvertently committed in Chancery, is manifest. He has been decreed to pay two-thirds of the rents and profits of the trust fund to his children, from the 16th of January, 1815, till 1828, whereas their rights first accrued to them on the death of their mother, on the 30th of June, 1818. If it be asked, why on this ground the decree of the Court of Chancery was not reversed on the appeal of John Diffenderffer? The answer is obvious; his not having made it a matter of exception to the auditor's statements, the Act of * 1825 precluded

349 him from suggesting it as an error, on his appeal to this Court.

That this Court may pass a final decree in the cause, we appoint and direct the auditor of the Court of Chancery to state a new account, upon the basis of this opinion, that the expense of such audit be paid by the appellants; and that the same, as a part of their costs, on their appeal, be taxed by the clerk of this Court.

Decree reversed.

BUCHANAN, C. J., dissented from the opinion of the Court, in relation to the liability of the appellant, (Diffenderffer) for compound interest.

KLINEFELTER'S Lessee vs. SARAH CAREY.—December, 1831.

In 1818, the tenant in possession failing to appear after notice, to an action of ejectment, judgment was rendered against the casual ejector. The plaintiff was then put into possession, under a writ of *habere facias* regularly executed. In 1827, C. claiming title to the land, by petition, in which the tenant in possession united, prayed the County Court to set aside the judgment, restore the possession, and admit the petitioners to defend the action, upon the usual terms: this being granted, the defendants afterwards moved the Court, to stay all proceedings, upon payment to the lessor, the rent due to him at the time of bringing the suit and the costs. This motion being also granted, the plaintiff appealed. *Held*, that the County Court erred in striking out the judgment, which was entered upon the tenant's failing to appear, after such a lapse of

time, and that the lessor of the plaintiff was entitled to a writ of restitution. (a)

Wherever a judgment in ejectment has been stricken out upon the tenant's failure to appear, it has always been one of recent date. It has generally been, where the period had been too short for improvements of importance to have been made in the intermediate time, and where no trial had been lost.

* APPEAL from Baltimore County Court. On the 9th of September, 1818, Michael Klinefelter's lessee (the present appellant,) brought an ejectment for a tract, or parcel of land in Baltimore County, called Lot No. 191, against one Solomon Richards, the tenant in possession. **350**

The following statement of the case is taken from the opinion of the Judge, who pronounced the decision of this Court.

This action of ejectment was instituted to September Term, 1818, when the tenant in possession failing to appear, judgment was rendered against the casual ejector, and a writ of *habere facias possessionem* issued returnable to March Term, 1819, when the sheriff returned that he had delivered possession on the 26th of November, 1818. About nine years afterwards, (to wit, November 23, 1827,) a petition was filed by Sarah Carey, and the tenant in possession, to set aside the judgment against the casual ejector, and to be permitted to appear to and defend the said action, they making the usual confession of lease, entry, and ouster, and that a writ of restitution might issue to restore the possession, to the tenant in possession, and that a rule might be laid upon the lessor of the plaintiff to shew cause why the said motion should not be granted. Upon this petition the Court ordered the judgment to be set aside, the cause to be brought up by regular continuances, and a writ of restitution to issue to restore the possession to Sarah Carey, who claimed the title, and that she be admitted as defendant. To declaration filed against her, Sarah Carey put in the plea of not guilty; and afterwards, on the 8th day of January, 1829, moved the Court, that the proceedings in the cause might be stayed, upon payment to the lessor the rent due to him, at the time of the suit brought, and the costs of suit. On the 21st day of February, 1829, the Court "ordered, that the proceedings in this cause be stayed, upon the defendant's paying to the lessor of the plaintiff, * all rent in arrear, which accrued from the time of the conveyance of the reversionary right to him, up to the day of the delivery of possession of the premises to the lessor." Whereupon the plaintiff prayed an appeal to this Court. **351**

The cause was argued before BUCHANAN, C. J., MARTIN, STEPHEN, and DORSEY, JJ.

(a) Cited in *Green vs. Hamilton*, 16 Md. 328; *Dennis vs. Kelso*, 28 Md. 387; *Joyes vs. Scott*, 34 Md. 60; *Mears vs. Remare*, 34 Md. 385.

Samuel I. Donaldson, for the appellant, contended : 1. The motion to set aside the judgment in this case was too late in point of time. Whenever the acquiescence is so long that the party may be presumed to have submitted to the judgment complained of, the Court will not disturb it. No judgment from which an appeal will not lie, can be considered a recent one. If an opportunity of trial has been lost by the delay, the judgment must stand, even though the motion to strike out be founded upon an affidavit of merits. *West vs. Davis*, 7 *East*, 363; *Harris vs. Masters*, 9 *Serg. & Low*. 158; *Aslin vs. Parkin*, 2 *Burr*. 665, 756; *Jackson vs. Stiles*, 4 *Johns. Rep.* 489; *Spurrier vs. Yieldhall*, 2 *H. & McH.* 173; *Gover vs. Cooley*, 1 *H. & G.* 7; *Jackson vs. Stiles*, 1 *Caines*, 505; *Munnikuyson vs. Dorsett*, 2 *H. & G.* 374; *Dand vs. Barnes*, 1 *Serg. & Low*. 291; *Fletcher vs. Wells*, 1 *Ib.* 352; *Stat.* 4 *Geo.* 2, ch. 28, sec. 2. 2. The notice given to the tenant in possession in this case was sufficient, and his failure to appear at the first term of the Court thereafter, was laches, and fatal to the present application. *Adams on Eject.* 209, 210, 216; *Ledger vs. Roe*, 3 *Taunt.* 505; *Good Title vs. Bad Title*, 4 *Ib.* 820; *Jackson vs. Wilson*, 3 *Johns. Cases*, 295; *Jackson vs. Demarest*, 2 *Caine Rep.* 381.

McMahon, for the appellee, insisted that the record did not present a fit case for an appeal. Where Courts have the power to strike out their judgments, an application for that purpose is to their discretion, and if the application is *successful or otherwise, an appeal will not lie. *Woods vs. Young*, 4 *Cranch*, 137; *Marine Insurance Co. vs. Hodgson*, 6 *Ib.* 217; *Welch vs. Mandeville*, 7 *Ib.* 152; *Hawkins vs. Jackson*, 6 *H. & J.* 151, (a); *Adams*, 225, 240. The appellee has been guilty of no laches which could preclude her from the right of appearing and defending the ejectment. She had no notice of the proceeding, or at least there is no evidence of notice. The Court is not at liberty to infer notice from circumstances, when positive proof might have been adduced. Klinefelter's affidavit, or the affidavit of Richards, could certainly have been procured if notice in fact existed. But suppose she had notice, mere delay is not laches. *Dand vs. Barnes*, 1 *Serg. & Low*. 291; *Fletcher vs. Wells*, 1 *Ib.* 352. The plaintiff's condition in this case is not worse, but better, than if he had not been in possession; for having enjoyed that possession for nine years, he has been reimbursed for his rent. If the appellee here was to bring her ejectment, she would not be estopped from recovering by the delay which has taken place, and therefore to prevent circuitry of action, the proceedings should be set aside. *Hitchings vs. Lewis*, 1 *Burr.* 614; *Jackson vs. Demarest*, 2 *Caine*, 381; 3 *Johns.* 226; *Jackson vs. Elsworth*, 20 *Ib.* 180.

STEPHEN, J. delivered the opinion of the Court. After making the statement before set forth, he said the question which presents itself to this Court is, whether the Court below were warranted in striking out the judgment, which was entered upon the tenant's fail-

ing to appear, after such a lapse of time, and permitting the proceedings to take place, which were subsequently adopted.

In all our researches, we have not been able to discover a single decision or precedent, which would countenance or sanction such a procedure. Wherever a judgment in ejectment has been stricken out upon the tenant's failing to appear, it has always been one of recent date, and never of such long standing as the one involved in the present *controversy. It has generally been where the period had been too short for improvements of importance to **353** have been made in the intermediate time, and where, as the books say, no trial had been lost.

If this case were to be governed by a rule adopted by analogy to that prescribed by the Legislature for the limitation of appeals, the proceeding would be clearly unwarrantable. But it is not deemed necessary to rely upon that legislative enactment as the basis of our decision, as it may be fully sustained by considerations drawn from other sources. It is true, that actions of ejectment, being creatures of their own, Courts of justice will lend a more favorable ear to applications of this nature, than in other cases; but still there are certain limits prescribed by reason, and the policy of the law, which ought not to be transcended. In *Jackson vs. Stiles*, 1 *Caine Rep.* 505, the Court say—"In ejectment, as it is the creature of the Courts, everything will be done to promote the justice of the case, according to right, and the Court will go further to protect the possession, when it can be done without injury to the plaintiff's claim, than it is willing in other cases to proceed. As therefore, there was a full knowledge in October last, of an intention to make this application, and the transactions are all of a recent date, we are of opinion that the default entered against the casual ejector, the judgment thereon, and the writ of possession sued out, be set aside, and a writ of restitution issue, on payment of costs." So in *Jackson vs. Stiles*, 4 *Johns. Rep.* 490, the Court also say: "The excuse given by the attorney of the defendant for not entering into the consent rule in season, is frivolous and inadmissible. But here the tenant swears to merits, and as no trial has been lost, we will not let the possession be changed in an action of ejectment, without an opportunity to the defendant to defend it. It was said in the case of *Jackson ex Dem. Rosekrause vs. Stiles*, 1 *Caine*, 503, that the Court would set aside a default to protect the possession of the tenant, in an action of ejectment, when they would not do *it in any other action. We therefore grant the motion, on payment of costs, and on the **354** tenant's entering into the consent rule, and pleading within ten days, so that the cause may be tried at the ensuing circuit in Ulster." In *Runn. Ejec.* 120, the law is stated to be as follows: "If a judgment be signed against the casual ejector, and it be made appear that no declaration was rightly served, the Court will set it aside. Also, where a judgment has been obtained against the casual ejector,

but no trial lost, the Court will, on payment of costs, and the tenant's entering into the common rule to confess lease, &c., set aside such judgment as in other actions; and not put the tenant to the charge and hazard of recovering back his possession by another action." So in 1st *Richardson's Prac.* 506, the law is laid down to be as follows: "Where judgment is obtained against the casual ejector, and a trial is not lost, the Court will, on payment of costs, and entering into the common rule for confessing lease, entry and ouster, set aside such judgment, as in other actions, and not put the tenant to the charge and hazard of recovering back his possession by another action." In *Spurrier's Lessee vs. Yieldhall*, 2 *H. & McH.* 173, the case was as follows: "An action of ejectment was brought to May Term, 1785, and at May Term, 1786, a judgment was confessed for possession and costs. A writ of *habere facias possessionem* issued to October Term, 1786, and the sheriff returned, "possession delivered." At May Term, 1787, it was ruled by the Court, "that Rezin Spurrier show cause, this term, why the writ of possession, and judgment entered at May Term, 1786, for his lessee, and Benjamin Yieldhall, should not be set aside." And on the 21st of May, in the same term, the following entry was made: "It appearing to the Court, by the affidavit of Upton Scott, that at the time of commencing the suit of Rezin Spurrier's lessee, against Benjamin Yieldhall, the said Upton Scott was in possession of nine and a quarter acres of the land, for which the ejectment was brought, and that no copy of the declaration in ejectment was served upon him, * and that the said

355 Scott claims the said nine and a quarter acres of land, as tenant in fee simple, and a rule having been served on the plaintiff to show cause, &c., and the said Upton Scott now praying that the judgment and execution be set aside, as to the said nine and a quarter acres, and that he be admitted defendant in this cause, as to the said acres: Ordered, that the judgment be struck out as to the said nine and a quarter acres claimed by the said Upton Scott." By all these cases the principle seems to be affirmed, that it is only where the judgment is a recent one that the Court will interfere for the purpose of setting it aside, to enable the tenant to appear and defend his possession. But no case it is believed can be found, where a judgment has been stricken out, after such a lapse of time, and under the circumstances existing in the present case.

*Judgment reversed, and a writ of restitution awarded,
to restore the possession to the appellant.*

PATRICK L. WATTS vs. JESSE GARRETT.—December, 1831.

In an action of a replevin for a negro slave, the plaintiff proposed to prove by his former guardian, that the negro in controversy was the plaintiff's

property; but it appearing, that this negro constituted a part of the plaintiff's estate during his minority, and during one period thereof had been in the witness' possession, the County Court held the witness incompetent. Upon appeal this was reversed.

When the competency of a witness is objected to on the ground of interest, the interest should appear. It should be seen by the Court, in order that it may be able to determine its character, and whether it be such as to amount to a disqualification. It should not rest in mere conjecture or speculation, but should be certain and direct, and not possible only.

Where the interest is of a doubtful character, the objection goes to the credit, and not the competency of the witness. (a)

* APPEAL from Baltimore County Court. On the 9th of July, 1828, the appellant brought replevin, against the appellee, to recover a negro slave, alleged to be the property of the appellant. The defendant pleaded, "*non cepit*" property in himself, and limitations, to which they were replications, and issues were joined. **356**

1. At the trial the plaintiff offered Margaret Willis as a witness, by whom he proposed to prove, that the negro in controversy was his property; but it being in proof, that the witness was guardian of the plaintiff, and that this negro was, during the plaintiff's minority, the property of the plaintiff, (which minority ended on the 1st September, 1827,) and during part of that minority in witness' possession, the defendant objected to her competency; and the Court, [ARCHER, C. J. and KELL, A. J.] sustained the objection. The plaintiff excepted, and the verdict and judgment being against him, he appealed to the Court of Appeals.

The case was argued before BUCHANAN, C. J., EARLE and DORSEY, JJ.

C. Birnie, Jr. and Gill, for the appellant, cited *Stark. Ev.* 744, 1729; 1798, ch. 101, sub-ch. 12, sec. 15; *Stewart vs. Kip*, 5 Johns. 256; *Abrahams vs. Bunn*, 4 Burr. 2255; *Mockbee vs. Gardner*, 2 H. & G. 176.

Belt, for the appellant, cited Act 1798, ch. 101, sub-ch. 12; 2 *Stark. on Ev.* 746, 747; *Hungerford vs. Bourne*, 3 G. & J. 137.

BUCHANAN, C. J. delivered the opinion of the Court. It does not appear in the bill of exceptions, and looking to the record only we are left to conjecture, on what ground the objection to the competency of the witness offered on the part of the plaintiff was made and sustained, and her testimony rejected by the Court. But we are informed * by counsel in argument, that she was interested in the event of the suit, and therefore incompetent. If it appeared, that the effect of her testimony would have been to rid herself of a responsibility, and to cast it upon the defendant, the **357**

(a) Cited in *Melvin vs. Melvin*, 6 Md. 549; *Andre vs. Bodman*, 18 Md. 252.

objection to her competency was well taken. But we do not perceive, that she had any direct interest in the event of the suit, sufficient to disqualify her. If she had any such interest, what was it? The mere circumstance that she had been the guardian of the plaintiff, during his minority, (then passed) surely was not of itself sufficient; but it should have appeared, that she had incurred a liability during her guardianship, in respect of the property in controversy, which she might by her testimony have shifted to the defendant. But it is difficult to discover, what liability she could, by her testimony, have shaken from herself, and cast upon the defendant. The possession which it appears she had of the negro, during a part of the minority of the plaintiff, may have subjected her to a responsibility for the hire, or annual value of him; but that forms no part of the matter in controversy, and could not have been transferred to the defendant, by any testimony she could have given. On the contrary, being called to prove that the negro was the property of the plaintiff; if she did receive the hire or annual value of him, during the plaintiff's minority, and had not properly accounted for it, or it was lost by any culpable negligence, or inattention to her duty, the very evidence she was called to give, that he was the property of the plaintiff, was evidence going to fix her liability for such hire, or annual value, and so far against her own interest. When the competency of a witness is objected to, on the ground of interest, the interest should appear. It should be seen by the Court, in order that it may be enabled to determine its character, and whether it be such, as to amount to a disqualification. It should not rest in mere conjecture or speculation, but should be shown to exist, and to be certain and direct, and not possible only. For the bare possibility of an action being brought against the * witness, furnishes no

358 objection to his competency. And where the interest is of a doubtful character, the objection goes to the credit, and not the competency of the witness.

In this case, we do not perceive that the witness offered by the plaintiff, was shown to have had any certain and immediate interest, one way or the other. She was legally entitled to the possession of the property, during the minority of the plaintiff, in her character of guardian, if it belonged to him; and for any thing appearing to us, may have surrendered up the possession, when he attained his full age. But it has been suggested by counsel, that she may have abused her trust as guardian, and improperly parted with that possession during the minority of the plaintiff, or by some misconduct, have incurred a liability to be sued, for the value of the property, if the plaintiff should not recover against the defendant, in this action, and was therefore interested in sustaining the suit by her testimony.

It may be possible, but no such liability or misconduct has been shown; and we are not bound, or at liberty, merely for the purpose

of rejecting her testimony, to presume that she did violate her duty; but rather, nothing appearing to the contrary, that she faithfully discharged it, and delivered the possession of the property to the plaintiff, when he became entitled to receive it. And the bare possibility that she may have rendered herself liable to an action, is not, we think, an objection to her competency. It is not like the case of *Hungerford vs. Bourne*, decided by this Court, which has been referred to. In that case there was a clear and certain liability on the part of the witness, who had a manifest interest in sustaining the suit; whereas here no liability is shown to exist.

Judgment reversed, and procedendo awarded.

• WILLIAM HANSON vs. JOHN BARNES' Lessee.—Decem- **359**
ber, 1831.

It is a general principle, that where a new person is to be benefited, or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party; but this principle does not apply to a case, where the new party becomes interested after the process is in the hands of the officer for execution. (a)

The death of a defendant before a levy on a *fi. fa.* in the hands of the sheriff prior to such death, does not render a *sci. fa.* against the heirs and *terre tenants* necessary; the sale under a *fi. fa.* thus issued and levied, passes title to the purchaser.

The writ of *fi. fa.* requires no order or action of the Court, to give the plaintiff the fruits of his execution. These are reaped when the sheriff discharges his duty under the process. (b)

Judicial writs do not in general abate by the death of the party.

Since the Statute of 5 Geo. 2, chap. 7, lands have not been considered as a secondary fund in the hands of the debtor for the payment of debts; but they are equally liable with his personalty. The judgment creditor may, at his election, seize either, unless under peculiar circumstances of equity, he shall be restrained from exercising his election to the prejudice of an alienee, devisee, or heir.

After the death of a debtor, lands are only secondarily liable, but this must be taken with the qualification, that prior to his death, they had not become liable to be affected by an execution. (c)

Parol evidence is admissible to establish the date of the delivery of an execution to the sheriff, where no endorsement of the time was made on the writ, as the statute demands of that officer.

Neither an endorsement of the time of the delivery of a writ of *fi. fa.* to the sheriff, nor evidence of that fact, is necessary in making title to lands purchased under that writ—Nor is it necessary as to personal property, except as against purchasers. (d)

(a) Approved in *Trail vs. Snouffer*, 6 Md. 315, and *Boyd vs. Harris*, 1 Md. Ch. 471. Cf. *Arnott vs. Nichols*, 1 H. & J. 288, note.

(b) See *Clarke vs. Belmear*, 1 G. & J. 241, note (b).

(c) Cf. *Polk vs. Pendleton*, 31 Md. 118; *Wyse vs. Smith*, 4 G. & J. 295.

(d) See *Estep vs. Weems*, 6 G. & J. 303.

The lien upon lands is from the rendition of the judgment, and the right to execution of lands in the tenure of the heir, grows out of the Statute 5 Geo. 2, ch. 7, in connection with that lien. (e)

If a sheriff's sale under a *fi. fa.* can be impeached, upon the ground of due notice of the sale not being given, that fact must appear affirmatively—for every thing is to be presumed in favor of the performance of his duties. (f)

A sheriff's return to a *fi. fa.* which reports a sale of lands, or his deed to the purchaser under the execution, is a sufficient memorandum in writing within the Statute of Frauds. It is not necessary that the return should be endorsed on the writ, or the deed executed at the time of the sale. (g)

360 * APPEAL from Charles County Court. Ejectment by the appellee, against the appellant, commenced on the 6th of March, 1826, for two tracts of land, called "Posey's Chance," and "Hopewell's Addition."

1. At the trial the plaintiff read in evidence a writ of *fi. facias*, issued upon a judgment rendered at March Term, 1824, at the suit of the State of Maryland, for the use of the plaintiff, against Samuel Hanson. The writ issued on the 28th of August, 1824, tested the day preceding, and was returnable to the then ensuing March Term of Charles County Court, and the sheriff's return as follows: "Laid as per schedule, and after due and legal notice being given, of the time and place of sale, the negroes mentioned in the within schedule, sold for \$415—\$214.39, applied towards *fi. fa.* No. 1.—\$15.97½ applied towards *fi. fa.* No. 2, and the residue being \$8.89½, retained for sheriff's fees on ditto, \$174.63—the balance being \$165.73, applied towards the discharge of this *fi. fa.* The lands contained in the schedule, sold to plaintiff for \$277—\$4.15 retained for sheriff's fees on ditto, and the residue being \$272.84, applied towards the discharge of this *fi. fa.* per receipt. Alex. Matthews, Sheriff." Schedule accompanying the foregoing return. "Charles County, to wit:—We, the subscribers, being duly summoned and sworn by the sheriff of Charles County, to value and appraise the goods and chattels, lands and tenements of Samuel Hanson, Sr. taken by virtue of a writ of *fi. facias*, at the suit of the State of Maryland, use of John Barnes, do value and appraise the same in current money as follows, to wit: all of said Samuel Hanson, Sr's right, title, claim and interest, whether in law or equity, of, in and into the following tracts, parts of tracts, or parcels of land, lying and being in Charles County aforesaid, called or known by the following names to wit: Posey's Chance, containing 100 acres, more or less, \$4 per acre—Pt. Hopewell's Addition, containing 44 acres, more or less, at \$4 per acre—Brawner's Chance, containing 50 acres, more or less, at \$4 per acre; * and Pt. Gonier's Choice, containing 100 acres, more or less, \$4 per

(e) Cited in *Anderson vs. Tuck*, 33 Md. 233.

(f) Affirmed in *Müller vs. Wilson*, 32 Md. 300.

(g) See *Barney vs. Patterson*, 6 H. & J. 157, note (d).

acres—Also the following personal property, to wit, &c. Given under our hands and seals the 9th day of October, 1824.”—On the back of the foregoing schedule is thus endorsed, to wit: “January 8th, 1825, the within land sold to John Barnes for \$277.00.” Receipt accompanying the foregoing return—“Received, June 13th, 1825, from A. Matthews, Esq. \$786.35, in full for money due me on the within writ.—J. Barnes.” He also offered in evidence, a deed from the said sheriff to the lessor of the plaintiff, for the lands in the schedule contained, executed, acknowledged and recorded on the 6th of March, 1826; and proved, that Doctor Samuel Hanson died in possession of the said lands, and of considerable personal property. That the defendant in this cause, was one of his heirs and representatives. It was further proved by the then sheriff, Alexander Matthews, that the said *feri facias* was delivered to him at nine o'clock on the 28th of August, 1824, and that Doctor Hanson died on the 1st of September following. That the Court of Charles County was in session at the time of issuing the said *feri facias*, which session commenced the — day of August of said year, and ended on the 3d of September. Thereupon the defendant prayed the opinion of the Court, and their instructions to the jury. 1st. That the plaintiff was not entitled to recover, without producing in evidence a grant from the State, and deducing the title of the debtor in said *feri facias* mentioned. 2d. That as the said *feri facias* was tested on the 27th day of August, 1824, when the Court was in session, as before stated, and without the special order of said Court, that it issued irregularly, and that the proceedings under it were void against the present defendant. 3d. That as Dr. Hanson died on the 1st of September, and the said *feri facias* was not levied until the 9th of October; that the issuing of said *feri facias*, and delivery to the sheriff as stated, did not bind the lands of the debtor, which had descended to the heir. 4th. That although the issuing and *delivery of said *feri facias* as stated, might bind the land upon a deficiency of personal 362 property, yet if the jury should believe, that there was a sufficiency of personal property to satisfy the same, that such personal property should first have been taken under said *feri facias*—all which opinions the Court refused to give. The defendant then offered in evidence the following advertisement, to wit: “Sheriff’s Sale—By virtue of three writs of *feri facias* to me directed, from Charles County Court, will be exposed to public sale, for ready cash, at the Trap, on the 8th of January next, the following property, to wit: all of Samuel Hanson, Sr’s, right, title, claim and interest in law or equity, of, in, and to the following tracts, parts of tracts, or parcels of land, lying and being in Charles County, Durham Parish, called and known by the following names, to wit: Perry’s Chance, containing 100 acres, more or less—Pt. Hopewell’s Addition, containing 44 acres, more or less—Brawner’s Chance, containing 54 acres, more or less; and Pt. Gonier’s Choice, containing 100 acres, more or less—and also the following

personal property, &c. The whole taken in execution as the property of Samuel Hanson, Sr., and will be sold to satisfy the following debts, to wit: one due to the State of Maryland, use John Barnes; one due to William Bruce, and one due to Ignatius Semmes. Alex. Matthews, Sheriff—Charles County, December 6th, 1824." And proved by Noble Barnes, that he as deputy sheriff, levied the *fiery facias* and made sale of the land; that this advertisement was in his handwriting, and was an original advertisement giving notice of said sale, and that the land in question was sold on the day mentioned in said advertisement. That the said Noble Barnes did not make any written entry or other memorandum of said sale; that he acted as auctioneer at the said sale, but the high sheriff was present and attended to the sale. The defendant then prayed the opinion of the Court, that unless the plaintiff proved to the jury, that there was some entry or memorandum in writing of the sale, that the sale was void—

363 which * opinion the Court refused to give—But directed the jury that the return of the sheriff on the *fiery facias*, and deed to the purchaser, the present plaintiff, was a sufficient memorandum in writing, and could not be rebutted, but by proof of fraud and collusion between the sheriff and the purchaser. The defendant then offered in evidence the endorsement of the *fiery facias*, and return thereof, which was interlined and written with ink of different colors, and prayed the opinion of the Court, that if the jury should believe that said endorsement and return was made *post litem motem* in this cause, it was competent evidence of fraud and collusion to go to the jury—which opinion the Court also refused to give. The defendant then lastly prayed the opinion of the Court, that if the jury should believe, that due and legal notice of the sale of the tract of land called Posey's Chance, as required by the Act of Assembly, was not made, that then the title of said tract did not vest in the purchaser by said sale, and for said tract the plaintiff was not entitled to recover—which opinion the Court refused to give.

The defendant excepted to all these refusals of the Court, to grant his prayers, and the verdict and judgment being for the plaintiff, he prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Brauner, for the appellant, contended, 1. That as Samuel Hanson died before the execution actually executed, the lands in the possession of his heir, could not be taken in satisfaction of the judgment against the father, until upon a suggestion and proof of deficiency of personal assets. *Jacobs' Law Dic. tit. Exec.* 495. 2. That a *fiery facias* binds goods and chattels, from the date of the delivery to the sheriff, but not lands, upon which, the judgment and not the *fiery facias* operates as a lien; and that after a descent cast, before execution levied, resort must be had to the personal estate. *Harding vs. Ste-*

enson, 6 H. & J. 267; the Act of 1785, ch. 72, sec. 5; * 1798, ch. 101, sub-chap. 8, sec. 17; 1 *Sellon's Pr.* 532; *Arnott vs. Nichols*, 1 H. & J. 472; *M'Elderry vs. Smith*, 2 I b. 72; the Statute of 5 Geo. sec. 2, ch. 7. 3. That parol proof of the date when the *feri facias* was received by the sheriff, is inadmissible. 4. That there is not sufficient proof of any note or memorandum in writing being made at the time of the sale. On the contrary, the deputy sheriff who made the sale, did not make any entry or memorandum thereof. 5. That notice of the sale of the tract called Posey's Chance, was not given according to the Act of Assembly of 1816, ch. 129, and that the sale, as to said tract, was void, if even plaintiff could recover as to the other tracts. 364

U. Dorsey, for the appellee. 1. The *fi. fu.* continues to run, and must be executed as to personal property, notwithstanding the death of the defendant, after the writ is delivered to the sheriff. *Sellon's Pr.* 528. Since the Statute of 5 Geo. 2, ch. 7, lands are made liable to the payment of all debts, and are subject to like remedies, proceedings and process, in any Court of law or equity, that personal estate is. 2. In *Bull vs. Sheredine*, 1 H. & J. 410, and *Barney vs. Patterson*, 6 H. & J. 182, the Court recognize the doctrine, that the sheriff's return gratifies the requisitions of the Statute of Frauds. 3. The object of the prayer in regard to the notice of sale, was to transfer a question of law from the Court to the jury. It belongs peculiarly to the Court to say what is legal notice. The question of the legality of sales is a mixed question of law and fact, and the prayer, therefore, should have been for a hypothetical direction.

ARCHER, J. delivered the opinion of the Court. It is supposed, that the death of the defendant, before a levy on the *feri facias*, although it was issued, and in the hands of the sheriff before his death, would render a *scire * facias* against the heirs and *terre tenants* necessary, and that the sale, made under a *feri facias* thus issued, and thus levied, passed no title to the purchaser. 365

Whether the alienation of land to a *bona fide* purchaser, or its descent to the heir before any steps are taken by the plaintiff, to put his judgment in execution, would render a *scire facias* against the heirs and *terre tenants* indispensable, it is not necessary to determine. For the question presented here, is whether pending proceedings in execution of the judgment, and which were all rightful and proper, at the time of their institution, the death of the defendant suspends them in point of law, or if in fact they are afterwards put in execution, the law declares them void. If this were a question connected with a levy on personal property, it would be too clear for discussion. The execution would go on, and the plaintiff would have a right to reap the fruits of his judgment. But this is a levy on land. Should it be governed by different principles? There is no process of execution in England, bearing an exact affinity to our *feri facias*, so far

as this question is concerned. We will, however, proceed to notice those, which bear to it the strongest resemblance.

A writ of sequestration, being a personal process, grounded on a contempt, and requiring the further order, or action of the Court, to give it an effect beneficial to the plaintiff, it is remarkable that it should have been doubted, whether it did not abate *de facto*, by the death of the defendant. Yet it appears to have been long in uncertainty; but it is now settled, that it does abate by the death of the defendant. 3 *Atk.*; *Burdett vs. Rockey*, 1 *Vern.* 58; 2 *P. Wm.* 621; *Wharam vs. Broughton*, 1 *Ves. Sen.* 182. These determinations will show the diversity of views which have been entertained on the subject, and the latter opinions of the Court, will show that its abating, depends upon reasons and principles which will not apply to the process under consideration.

366 * The writ of extent on a statute merchant, will not abate by the death of the defendant; 2 *P. Wms.* 621; and in 2 *Saund.* 70, (C), it is said, that an extent shall go, notwithstanding the death of the defendant shall be returned on a *capias si laicus*. And the same doctrine would seem to be deducible, with regard to a writ of *extendi facias*, issued on a statute staple, or on a recognizance in the nature of a statute staple from 2 *Saund.* 70, (C), in which the nature and character of the sheriff's return, with regard to the lands extended, where the sheriff shall return the death of the defendant, is pointed out. The same principles would seem to apply to the writ of *elegit*, in which any future action of the Court, to give the plaintiff the entire benefit of his execution becomes unnecessary; for the inquisition, appraisement, and delivery of a moiety of the lands, is done under the direction of the sheriff and the authority of the *elegit* itself. Like the writs of *elegit* and *extendi facias* upon a statute merchant, the *fieri facias* requires no other order or action of the Court, to give to the plaintiff the fruits of his execution. These are reaped, when the sheriff discharges his duty under the process. The mandate goes to the sheriff to seize and sell the lands, and if it be regular in its inception, he derives his authority from the writ, and is bound to execute it. Unlike the original writs, judicial writs do not in general abate by the death of the party. 1 *Bac. Abr. title Abatement*.

The general principle, that where a new person is to be benefited, or charged by the execution of the judgment, there ought to be a *scire facias* to make him a party, is admitted; but it cannot apply to a case, where the new party becomes interested, after the process is regularly in the hands of the officer for execution. If this be not an exception to the rule, and a *scire facias* against the heirs and *terre tenants* be necessary, then successive alienations and descents, might defeat the plaintiff, *ad infinitum*. Even excessive vigilance could not always secure to the plaintiff the satisfaction of his judgment.

* It supposed that there existed no right under the *feri facias* to levy on the lands, if there was a sufficiency of personal property to satisfy the judgment. Under the writ of *elegit*, if there be enough of personal goods, the sheriff ought not to levy on the lands. But this duty of the officer under the writ of *elegit*, grows out of the Statute of West. 13 Edw. 1, ch. 18, which gave that writ. But the Statute of 5 Geo. 2, ch. 7, stripped lands in the Plantations, of the sanctity with which they had been guarded, and by subjecting them to sale, no longer considered them as a secondary fund for the payment of debts in the hands of the debtor, but rendered them equally liable with his personalty. It is at the election of the plaintiff, whether he will seize lands or goods, and this has always been the construction of the statute, unless under peculiar circumstances of equity he shall be restrained from exercising his election, to the prejudice of an alienee, devisee or heir. It is true, that after the death of a debtor, lands are only secondarily liable; but this must be taken with the qualification, that prior to the death of the debtor, they had not become liable to be affected by an execution. It does not appear from the evidence in the cause, that any endorsement was made on the back of the writ, as the statute demands of the sheriff, of the day of its delivery to him, and it is therefore supposed that parol evidence to establish that date is inadmissible. If this idea be correct, there exists scarcely a case in Maryland, in which the date of a delivery of a *feri facias* to the sheriff, could be proved. This requisition has in practice been neglected, and fallen into disuse. To give the statute such a construction here, would make its provision in this respect a dead letter. Its objects, was only directory to the officer, that means might be placed in the power of every one, to derive benefit from the salutary provisions of the statute; and was not meant to exclude other evidence, should that officer neglect his duty. *Bealls vs. Guernsey*, 8 Johns. 52. There is then proof in the record, that the *feri facias* was delivered to the sheriff * before the death of the debtor, if it were material to have established that fact. But suppose the fact had not been established, but that merely an execution had been issued by the plaintiff in the judgment; it is most certain that lands in the seizure of the heir, might be levied upon, because the statute renders them liable to seizure, sale, and disposition, in the same manner as personal property; and in such a case, the levy could have been made on the personal property, in the hands of the executor; for the judgment and execution, binds the personal property from the day of the signing of the judgment, and the test of the writ of execution, against the party himself, and all other persons except purchasers. 1 Saund. Rep. 219, f. It is true, that the *feri facias* does not bind land, as it does personal property from the delivery of the writ to the sheriff. The Statute of Charles II, only applying to goods, but the lien on the lands is from the rendition of the judgment, and the

right to execution of lands in the tenure of the heir, grows out of the Statute of 5 Geo. 2, ch. 7, in connexion with that lien.

It does not become necessary to express an opinion how far the sheriff's sale would be operative, to pass title to a purchaser, unless he shall have given the notice of sale required by law, because there is no evidence in the record, from which the jury could infer, that notice had not been given. The adduction of a single advertisement, which does not even appear to have been any where published, or affix to give notice to the public, can furnish no data for deductions, that regular notices were not given, and in the absence of evidence to that effect, every thing is to be presumed in favor of the performance of his duties by the sheriff. It has been objected, that no memorandum in writing, of the sale by the sheriff, was made at the time of the sale. The sheriff had made a return to the *feri facias*, which evidences the sale, and has executed a deed to the purchaser, either of which is sufficient evidence of the sale, and a sufficient memorandum, in writing, within the Statute * of Frauds.

369 *Barney vs. Patterson*, 6 H. & J. 182. It is clearly not necessary, that the return should be endorsed on the writ, or the deed executed at the time of sale.

We have thus noticed all the points which have been raised before us. There are in the record, several other opinions of the Court, from which exceptions have been taken, but they have not been argued before us, and we have considered them as abandoned.

Judgment affirmed.

PENN vs. FLACK AND COOLEY.—December, 1831.

A prayer by the defendant addressed to the Court requesting them to instruct the jury, that "the plaintiff upon the evidence, is not entitled to recover upon either count in the declaration," is, since the Act of 1825, ch. 117, too general in its terms, and the refusal to grant it, is not the subject of an appeal. (a)

The endorsee of the payee of a negotiable note, can maintain an action on the money counts, against the maker of the note, upon the proof of the note and endorsement. (b)

Where the declaration averred that a negotiable note was endorsed, before it fell due, and it appeared upon the production of the note, that it was endorsed after maturity, this was held to be no material variance.

(a) Affirmed in *Hatton vs. McClish*, 6 Md. 417; *Dorsey vs. Harris*, 22 Md. 88; *Casey vs. Suter*, 36 Md. 4; *Kinsey vs. Minnick*, 43 Md. 119; *R. R. Co. vs. Carter*, 59 Md. 311. See *Davis vs. Leab*, 2 G. & J. 186; *Leopard vs. Canal Co.* 1 Gill, 222; *Wheeler vs. State*, 7 Gill, 343.

(b) Approved in *Merrick vs. Bank*, 8 Gill, 68; *Lewis vs. Kramer*, 3 Md. 292; *Hopkins vs. Kent*, 17 Md. 120.

Although the judgment was affirmed because the prayer offered by the appellant was too general, yet the Court expressed its opinion on the whole case. (c)

APPEAL from Montgomery County Court. Assumpsit by the appellees, as the endorsees of the following promissory note, against the appellant, William G. Penn, as the maker thereof, commenced on the 11th of October, 1827.

"\$80. Sixty days after date, I promise to pay to John Morrison, or order, eighty dollars, without defalcation, value received. Wm. G. Penn. May 21st, 1818." Endorsed. "Pay to James Flack & Co. April 24th, 1824. John Morrison."

* The declaration contained a count on the note, setting out the endorsement, which it averred to have been made, before the time limited in the said note for the payment thereof, to wit, on the day and year aforesaid, at the county aforesaid, (being the day of its date;) and also contained counts for money lent and advanced; money paid, laid out, and expended; and money had and received. The defendant pleaded *non assumpsit*, and issue was joined. **370**

1. At the trial, the plaintiff offered in evidence the promissory note, having proved that the same was signed by the defendant, and that in the year, 1824, the said note was purchased by the plaintiffs in this action, (who are James Flack & Co.) and assigned to them by a certain John Beal, the endorsement of John Morrison, the payee, then appearing on it; and that on the 24th of April, 1824, after the said assignment was made, the said note was presented in behalf of the plaintiffs to the defendant, who paid \$20 thereon; admitted the note to have been made by him; and said, that in a month's time, he would pay the original amount of the note, but would not pay interest, because he has sent the money by a neighbor to pay the note to the owner, before it came into the hands of the plaintiffs, but the owner could not be found. The defendant thereupon prayed the Court to instruct the jury, that the plaintiffs upon the evidence, were not entitled to recover upon either count in the declaration. But the Court [KILGOUR, A. J.] refused to give the instruction. The defendant excepted.

2. After the evidence contained in the first bill of exceptions had been given, the defendant further prayed the Court to direct the jury, that unless they were satisfied the endorsement to the plaintiffs, had been made before the expiration of the time when the said note became payable, the plaintiffs were not entitled to recover. This instruction the Court also refused to give. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

(c) Cited in *Bayne vs. Suit*, 1 Md. 86.

371 * The cause was argued before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

Alexander, for the appellant, contended, 1. That the prayer of the defendant, in the 2nd exception, ought to have been granted. The declaration alleged, that the endorsement to the plaintiffs was before the note fell due, when the proof was otherwise. This is a variance which is fatal. 2 *Stark. Ev.* 245. He insisted, that all averments in a declaration are material, and must be proved, which affect the defences open to the defendant. If the averment in this case had been true, the defendant could not show a want of consideration, which he would be allowed to do, if the note had been endorsed to plaintiffs, after it became due, as was the case in point of fact. 2. It appears from the evidence, that the plaintiffs purchased the note; and therefore it is not proof of money had and received by the drawer for their use; neither could it be considered as evidence of money paid, laid out, and expended by them, for the use of the drawer. 2 *Stark. Ev.* 99. A note is only evidence under the money counts, as between the immediate parties. 1 *Saund. P. and Ev.* 340; *Waynam vs. Bend*, 1 *Camp.* 175.

Johnson and Gill, for the appellant. 1. The averment as to the time of the endorsement is immaterial. If the evidence shows, that the endorsement took place subsequent to the maturity of the note, the defendant will be let into the defence of a want of consideration, notwithstanding the averment to the contrary in the declaration. The averment therefore can have no influence on the defences open to him. *Young vs. Wright*, 1 *Camp.* 140; *Russell vs. Langstaff*, 2 *Doug.* 514. If the action was against the endorser, the case might be different, but as respects the maker, the averment as to time is perfectly immaterial. The liability of the maker to the endorsee, arises from the fact of the endorsement, and not its date. * *Chitty on Bills*, 286; *Grant vs. Vaughan*, 3 *Burr.* 1516, 1525. 2. The note was evidence under the money counts. The promise of the maker is, that he will pay to the payee, or his order; and when he gives the order by endorsement, the maker holds the money for the use of the endorsee. *Young vs. Wright*, 1 *Campb.* 140.

STEPHEN, J. delivered the opinion of the Court. This case presents two questions for the decision of this Court. The first is, whether an endorsee of the payee of a note, can maintain an action for money had and received, against the maker? and the second, whether it is a material variance to declare that a negotiable note was endorsed by the payee before it became due, and to offer proof of an endorsement after it fell due? Upon the first question there is a contrariety of opinion in the books, but upon the most mature deliberation, we are of opinion that the action is maintainable, upon sound legal principles; the note is a contract by the maker to pay the money to the payee or his endorsee. It is well established, that

in an action by the payee against the maker, the note is evidence upon a count for money had and received: being therefore, evidence of money had and received to the use of the payee, by the maker, when the payee transfers his interest in the note by endorsement, (the note being payable to the payee or his order,) it would seem to follow, that by the very terms of the contract, the endorsee would become substituted in the place of the payee, and be invested with all his legal rights, not only as relates to a suit upon the note since the Statute of Ann, but also as to the common law count of money had and received. In the case of *Grant vs. Vaughan*, 3 *Burrows' Rep.* 1516, which was an action by the bearer of a bill of exchange against the drawer, which bill was in the following words, "Pay to Ship Fortune, or bearer," so much, Lord Mansfield makes the following remarks: "But upon the second count, (which was for money had and received,) the present case is quite clear, beyond all * dispute. For undoubtedly an action for money had and received **373** to the plaintiff's use, may be brought by the *bona fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person, who has the note as bearer. In this case, Bicknell himself might undoubtedly have brought this action. He lost it, and it came *bona fide* and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. Bicknell and the plaintiff are both innocent. The law must determine which of them is to stand to the loss, and by law it falls upon Bicknell." In this case the bill was payable to bearer; in the case now before this Court it was payable to order, and it seems to us that it would require a considerable degree of legal ingenuity, to distinguish between the two cases, in point of legal principle, as to the legal operation of the two contracts. They were both negotiable in their characters, the only difference is, that the one was payable to bearer, the other to order. In 12 *Johns. Rep.* 90, the action was brought on two promissory notes: one was in the following words: "For value received, due Wm. Douglass or bearer, \$14.50, with interest, payable the 1st of March next, Springfield, 8th Nov. 1811, signed James Pierce." The second note was dated, Dec. 25th, 1811, and the defendant promised for value received, to pay Wm. Douglass, or bearer, the sum of \$18, with interest. In a suit brought upon these notes, the plaintiff below, under the direction of the Court recovered, and upon a writ of error being brought to the Supreme Court, that Court delivered the following opinion: "This was an action of *indebitatus assumpsit*, for money had and received, money lent, &c. and the chief question is, whether the promissory notes in the hands of the plaintiff below, as bearer, were properly admitted in evidence under such a count. It is clear, that as well before, as since the statute making notes negotiable, the person named as payee, might give such note in evi-

dence, under * the general counts for money lent, or money
374 had and received," &c., (here this Court refers to a number of authorities, and amongst them, the case of *Grant vs. Vaughan*, above referred to, and then proceeds,) "The Statute of Ann gave an additional remedy, but did not take away the old one." "If, as all agree, such a note before the statute, was evidence of money due from the maker to the payee, so as to support a count for money had and received, I can see no good reason why an assignee by endorsement or delivery ought not to have the same remedy. It was the object of the statute to place the assignee in the same relation to the maker, as the payee stood in before; and the legal operation of the transfer is, that the money which by virtue of the note was due to the payee from the maker, is now due from the maker to the assignee. These notes were payable to William Douglass or bearer, like the form used in bank notes. Bearer is *descriptio personae*, of the real payee. It may be that Wm. Douglass had no knowledge of the note, or is a fictitious person. The note however, is transferable by delivery merely, and possession was evidence of property in the plaintiff below, *prima facie*. It is objected by the counsel for the defendant, that there is no privity of contract between these parties; and several authorities were cited to show, that *indebitatus assumpsit*, will not lie except between privies. To this objection there are two answers—first, there is a legal privity of contract between the maker of a negotiable note and the assignee or bearer in this case. It is a contract to pay the money to whoever may become entitled to it by transfer, as bearer; and such privity commences, as soon as the bearer becomes so entitled.—Secondly, it is not true, that the action for money had and received, can only be grounded on privity of contract. It lies against the finder of money lost. It is the proper action to recover money obtained by fraud and deceit. If a man without my authority, receive money due to me, I may recover it from him in this form of action, and certainly in these cases there is no privity of contract. * In the case of *Wayman vs. Bond*, 1st *Campbell's Nisi*
375 *Prius*, 175, precisely like the present case, Lord Ellenborough decided, that the right of giving a promissory note in evidence under the general money counts, is confined to the original party to whom the note was payable. But this was a *nisi prius* opinion; and as the plaintiff in that case recovered on another count as the endorsee of the same note, it never became material to revise the decision. That opinion of Lord Ellenborough contradicts the decisions of several of his illustrious predecessors. In the case of *Tablock vs. Harris*, 3 *D. and E.* 174, it was decided that an endorsee of a bill of exchange may recover against the acceptor, under a count for money had and received; and Lord Kenyon there says, "in making this decision we do not mean to infringe a rule of law, which is very properly settled, that a *chose in action* cannot be transferred: but we consider it as an agreement between all the parties, to appropriate so much property,

to be carried to the account of the holder of the bill." In the case of *Grant vs. Vaughan*, 3 Burr. 1516, it was decided, that *indebitatus assumpsit* for money had and received was a proper action to recover the value of a bill of exchange by the bearer against the drawer; and Lord Mansfield there says, "undoubtedly an action for money had and received to the plaintiff's use, may be brought by the *bona fide* bearer of a note, made payable to a bearer; there is no case to the contrary." The case of *Cruger vs. Armstrong and another*, 3 Johns. Cases, 5, supports the same doctrine. The principles contained in this decision are fully sustained by the Supreme Court of the United States, in the case of *Raborg and others vs. Peyton*. In that case, (which was an action of debt brought by the endorsees of a bill of exchange against the acceptor,) Mr. Justice Story, in delivering the opinion of the Court says, "privity of contract may exist, if there be an express contract, although the consideration of the contract originated *aliunde*. Besides, if one person deliver money to another, for the use of a third person, it has been settled that such a privity exists, that the latter * may maintain an action of debt against the bailee. In general, the legal predicament of 376 the maker of a note, is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill, in the first instance; and after endorsement each incurs the same liabilities." The Judge, in delivering the opinion of the Court, further remarks, that, "in point of law every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee."

The only remaining question is, whether, when a note is declared on by the endorsee against the maker as being endorsed before it is due, it is a material variance to prove it to have been endorsed after it became payable? In *Chitty on Bills*, 462, the law is stated to be, that "if a note payable to bearer be declared on as endorsed, the endorsement must be proved; but when the declaration states that the endorsement was made after the making of the bill, and it appears in evidence to have been before, or that it was before the bill was due, and it appears in evidence to have been made afterwards, this is not a material variance." In support of this principle, he refers to *Young vs. Wright*, 1 Campb. 139.

In this case we think it proper to observe, that it appears to us, that the prayer in the first bill of exceptions is too general under the Act of 1825, but, as the prayer in the second bill of exceptions is sufficiently specific, and the case was fully argued, to prevent future litigation, we have delivered our opinions on both exceptions.

We are of opinion, that there is no error in the judgment of the Court below, and that it ought to be affirmed.

Judgment affirmed.

377 * JOSIAH TURNER vs. JAMES WALKER.—December, 1831.

Where goods taken under a *fi. fa.* have been sold for a part of the amount due on the judgment, a *ca. sa.* cannot be legally issued for the residue, until the sheriff has made a final return of the *fi. fa.* showing what has been done with the property. This return should be in term time; if made in the recess to the clerk's office, it is void. The same principles apply to a *venditioni exponas.* (a)

An action upon the case is the proper remedy against one who maliciously procures a *ca. sa.* to be issued, and another to be arrested under it. (b)

The foundation of such an action is malice, and a want of probable cause, which must be proved.

The fact of malice always a question for the jury.

Malice may be, and most commonly is, in such actions, implied from the want of reasonable or probable cause, that being first established. But the presumption of malice resulting from the want of probable cause is not conclusive, and the defendant, for the purpose of rebutting the inference of malice, may be let in to show, for instance, that he acted under the advice of counsel. The effect of such evidence, is however, for the jury. (c)

Evidence of the conduct and declarations of the defendant in relation to, and in the course of the transaction—of the situation of the parties—of the nature and extent of the injurious means resorted to by the defendant to effect his object, and of his forwardness, zeal and activity manifested in the procurement and use of the means employed, may properly be adduced to prove malice.

It is generally true, that in an action for a malicious prosecution, or a malicious arrest, malice—the want of probable cause, and also the determi-

(a) Approved in *Baldwin vs. Wright*, 3 Gill, 246. Cited in *Griffith vs. Etna Co.* 7 Md. 108; *Ex parte vs. Watkins*, 7 Peters, 578.

(b) Cited in *Deal vs. Harris*, 8 Md. 44, and *McNamee vs. Minke*, 49 Md. 133. In the latter case, the Court said: "It is true, a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding; but when it has been attempted to hold a party liable for the prosecution of a civil proceeding it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of *Turner vs. Walker*, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy or the like. * * It is not enough for the plaintiff to declare generally that the defendant brought an action against him *ex malitia et sine causa, per quod* he put him to great charge, &c.; but he must allege and show the grievance specially. Otherwise parties would be constantly involved in litigation, trying over cases that may have failed upon the mere allegation of false and malicious prosecution." And it was accordingly held that an action for the alleged malicious prosecution of an ejectment suit, wherein the plaintiff failed to recover all that he claimed, could not be maintained.

(c) Cited in *Schindel vs. Schindel*, 12 Md. 123, and *Straus vs. Young*, 36 Md. 255, 256. See note (d).

nation of the prosecution, or of the suit in which the writ was sued out, must be averred and proved. (d)

But where a *vendi.* was sued out, returnable to March, and the sheriff in fact executed that writ, and returned it to the clerk's office in December, and the plaintiff then sued out a *ca. sa.* which was also returnable to the same term, with the *vendi.* under which the defendant was arrested and imprisoned in December, the reason for averring in an action upon the case, the want of probable cause for the arrest, and the determination of the suit, does not exist, and a declaration showing the facts specially, in the absence of the ordinary averment, would be sufficient.

It is not upon the evidence, but upon the pleadings, as evidence applicable to the pleadings, that a plaintiff can recover in any case. (e)

Where the plaintiff, who had obtained a verdict in an action for a malicious arrest, died pending an appeal, the Court, on reversing the judgment upon a bill of exceptions, refused a *procedendo.* (f)

* APPEAL from Prince George's County Court. This was an action on the case brought by the appellee, against the ap- **378**
pellant, on the 10th of January, 1827, in St. Mary's County Court, and removed, upon the suggestion of the defendant, to Prince George's County Court.

(d) Affirmed in *Boyd vs. Cross*, 35 Md. 197, and *Medcalf vs. Ins. Co.* 45 Md. 204. In the former case the Court said: "To have entitled the plaintiff to recover for malicious prosecution, it was incumbent upon him to prove affirmatively, that he had been prosecuted, or that a prosecution had been instigated, by the defendant; that such prosecution had terminated in his discharge or exoneration from the accusation against him; and that such prosecution was both malicious and without probable cause on the part of the defendant. All of these propositions must concur and be established by the plaintiff to entitle him to maintain his action. If the evidence adduced, be legally insufficient to be submitted to the jury to prove each and all of these elements of the plaintiff's case, his action could well be pronounced groundless, and the defendant not be called on for his defence." Malice is a question of fact for the jury, and its existence may be inferred from the want of probable cause for the prosecution. But the absence of probable cause is not conclusive of the presence of malice. The presumption of malice resulting from the want of probable cause is only *prima facie*, and may be rebutted by evidence. But proof even of express malice will not justify the inference that probable cause did not exist. *Boyd vs. Cross*; *Medcalf vs. Ins. Co.*; *Stewart vs. Sonneborn*, 98 U. S. 187. What will amount to the want of probable cause in any case is a question of law for the Court, although the existence of the facts relied on to constitute the want of probable cause is a question for the jury. *Thelin vs. Dorsey*, 59 Md. 539; *Johns vs. Marsh*, 52 Md. 323. An action for malicious prosecution may be maintained against a corporation aggregate. *Carter vs. Machine Co.* 51 Md. 290. Cf. *Bank vs. Owston*, L. R. 4 Appeal Cases, 270.

(e) Approved in *State vs. Gaither*, 11 G. & J. 173.

(f) In *Clark vs. Carroll*, 59 Md. 180, it was held that where in an action for malicious prosecution, the plaintiff appeals from a judgment in favor of the defendant, and after the appeal taken the defendant dies, the suit will abate, and that such action is not within the purview of Rev. Code, Art. 50, sec. 147.

The declaration was as follows: "For that heretofore, to wit, on the 13th of December, 1826, at, &c. the said Josiah, unlawfully and maliciously procured, and caused to be issued out of the clerk's office of the County Court of said county, a certain precept of the said Court, commonly called a writ of *capias ad satisfaciendum*, attested by the Chief Judge, and certified by the clerk of the said Court, under the seal of office of the said clerk, bearing date the 13th of December, 1826, directed to the sheriff of the said county, commanding him to take the body of him the said James into his custody, and him safely keep in his custody, by the authority of the said writ; and that the said Josiah Turner, then and there unlawfully and maliciously delivered the said writ to William Williams, the sheriff for the time being, of the said county; and then and there, unlawfully and maliciously procured, and caused the said sheriff, then and there, to arrest the said James, and imprison him for a long time, to wit, for the space of two months thence next ensuing the said arrest; he, the said Josiah, then and there pretending and declaring to the said sheriff, that the said writ was lawful and right, and fully authorized and required the said sheriff to arrest and imprison the said James; whereas the said James avers, that the said writ was unjust and unlawful, and oppressive to him, and obtained by fraud and deceit; and the said James in fact says, that the said Josiah Turner did, on the day and year last aforesaid, at the county aforesaid, unlawfully, maliciously and fraudulently, cause and procure, by the means aforesaid, the arrest and imprisonment of him the said James, in manner and form, and for the time aforesaid, in abuse of the legal process of the said Court, and in contempt and disregard of the said Court, and its authority; and in oppression of him the said James, to * the

379 damage," &c. The defendant pleaded not guilty, and issue was joined.

1. At the trial the plaintiff read in evidence to the jury by consent of parties the record of a writ of *capias ad satisfaciendum*, issued out of the clerk's office of Saint Mary's County Court, on the 13th of December, 1826, on a judgment in said Court, at the suit of William T. Cross & Co. use of Josiah Turner, against James Walker. The writ recites, that on the 22d of March, 1825, a *fiery facias* had issued on said judgment, returnable to the first Monday in August then next. That on the return day of said writ, the sheriff returned that he had taken in virtue thereof, sundry real and personal estate, the property of Walker, which remained on hand for want of buyers, and which said goods and chattels were replevied out of his hands. It further recited, that on the 28th of August, 1826, a writ of *venditioni exponas*, issued for the sale of said real and personal property, returnable to the first Monday of March next following—which last mentioned writ the sheriff returned on the 12th of December, 1826; that by virtue thereof he had sold the property levied on for the sum of \$88.25, and which was not sufficient to satisfy the said judgment at

suit of Cross & Co. for the use of said Turner. Whereupon the said sheriff was commanded, &c. At the return day of said *capias ad satisfaciendum*, to wit, on the first Monday of March, 1827, the sheriff returned the same "*cepi*," when a motion was made by the said Walker to quash the same, upon the ground that the writ of *renditioni exponas* was returned to the clerk's office on the 12th of December, 1826, being in the vacation or in the recess of the Court; and that on the 13th of December, 1826, the plaintiff caused the *ca. sa.* to be issued. The County Court quashed the said *ca. sa.* and discharged the defendant, Walker, from custody. It was agreed that the *feri facias* and return thereto, the *renditioni exponas* and return, the *capias ad satisfaciendum* and return, and the motion to quash the same, with the proceedings thereon, should have the same effect as if the records were *inserted at large. The plaintiff also proved that he was arrested by the sheriff of Saint Mary's 380 County, on the 14th or 15th of December, in the year 1826, and kept in close custody for seven or eight days, by virtue of the said writ of *capias ad satisfaciendum*, the defendant being present at the time of the arrest, ordering it to be done, and directing the said sheriff to keep the said plaintiff in close confinement. The plaintiff further proved by Joseph Harris, clerk of Saint Mary's County Court, that he was applied to by the defendant, on the 13th December, 1826, the day on which the *capias ad satisfaciendum* issued, to issue the same, that he objected to doing so, upon the ground that it was unusual, and would not issue the same, unless written orders were given to that effect: that such orders were given by G. N. Causin, Esq. the counsel for the present defendant; he the defendant being at the time present, sanctioning and approving of the orders given by the said counsel. Whereupon the defendant, by his counsel, prayed the Court to instruct the jury, that the above *capias ad satisfaciendum* was legally issued, and that the plaintiff could not support his action—which instruction the Court [STEPHEN, C. J. and KEY, A. J.] refused to give, and instructed the jury that the said writ was issued irregularly and illegally, and that the arrest, above stated, of the plaintiff under it, was a sufficient ground to support the present action.

The defendant then prayed the Court to instruct the jury that the plaintiff, on the above evidence, could not support the present action on the case, but should have brought an action of *trespass vi et armis*, which instruction the Court also refused to give; and instructed the jury that the plaintiff was entitled to recover in the present form of action. The defendant also prayed the Court to instruct the jury. 1st. That the *capias ad satisfaciendum* was legally issued; the judgment on which it was issued, being in force and unsatisfied, and the whole of the property seized under the *feri facias* having been sold; and the writ under which the sale had been made, having been pre-

viously returned by the *sheriff. 2d. That if the plaintiff in
381 the suit had no right to apply for a *ca. sa.*; at the time it was issued the clerk had no authority to issue it, and there being no legal authority for the issuing of the same, it was a nullity. 3d. If the writ ought not to have been issued, the sheriff to whom it was directed, and who had previously made the return of the *venditioni exponas* aforesaid, was not bound to execute it. 4th. That if the said writ of *capias ad satisfaciendum* was improperly issued by the clerk, the defendant in this suit is not answerable in damages to the plaintiff for any act done previous to the arrest. 5th. That damages for the act of arrest can be recovered only in an action of *trespass vi et armis*. 6th. That if the plaintiff had offered proof of an injury, which entitled him to recover damages in an action on the case for a malicious arrest, yet that the *narr.* does not entitle him to recover such damages, inasmuch as it does not state that the proceeding which is made the ground of the action, was commenced without probable cause, nor ended. 7th. That if this be an action on the case of any other description, the plaintiff cannot recover, because the injury of which he complains in the declaration is not charged in the declaration to follow consequentially from any act of the defendant, other than that of causing the plaintiff to be arrested. 8th. That if the jury should be of opinion, from the evidence, that the defendant, when he applied to the clerk of Saint Mary's County Court for, and obtained the writ of *ca. sa.* aforesaid, did not believe it was illegal to issue the same, and at the time of putting the same into the sheriff's hands, he did not believe that the arrest of the plaintiff in virtue of the same would be illegal, but had been advised by his counsel, and believed that he had a right to sue out the same, and have the defendant arrested under it; and further, that the defendant, when he directed the same to be served, did not claim more than the balance *bona fide* due on said judgment, after allowing the whole sum made on the *venditioni exponas* aforesaid, then the plaintiff is not entitled
 to recover upon the *pleadings and issue in this suit. 9th.
382 That if the jury should be of opinion from the evidence, that the clerk of Saint Mary's County Court, upon being applied to by the defendant, refused to issue the *ca. sa.* aforesaid, and that the same was issued by the clerk aforesaid, after his refusal aforesaid, and in consequence of the directions of G. N. Causin, Esq., an attorney of said Court and the counsel of the defendant in that cause, then the plaintiff, upon the pleadings and issue in this cause, is not entitled to recover, although the defendant was present at the time of the issuing of the same, and repeated his request to the said clerk; and was afterwards present at the time of the arrest of the plaintiff, and directed it, and also directed the sheriff to commit him to prison. These several instructions the Court refused to give. The defendant excepted, and the verdict and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANAN, C. J., EARLE and ARCHER, JJ.

Magruder and Stonestreet, for the appellant, cited 1 *Archbold Pr.* 270; *Oviat vs. Vynar*, 1 *Salk.* 318; *Miller vs. Parnell*, 6 *Taunt.* 370; 1 *Sellon Pr.* 535; *Morgan vs. Hughes*, 2 *Durnf. & East*, 225, 231; *Snow vs. Allen*, 2 *Serg. & Low.* 485; *Ravenga vs. McIntosh*, 9 *Ib.* 225; 1 *Stark. Ev.* 503; *Purl vs. Duvall*, 5 *H. & J.* 69; *Towson vs. Havre de Grace Bank*, 6 *H. & J.* 47; 2 *Saund. P. Ev.* 192.

C. Dorsey and Johnson, for the appellee, cited *Hobert*, 205; *Gyfford vs. Woodgate*, 11 *East*, 297; *Elsee vs. Smith*, 18 *Serg. and Low.* 344; 2 *Saund. P. and Ev.* 651; 1 *Archb.* 6, 284; *Shirley vs. Wright*, 2 *Ld. Raymond*, 775; 2 *Bac. Abr. title Execution*, 709; *Wilson vs. Kingston*, 18 *Serg. and Low.* 307; *Ravenga vs. McIntosh*, 9 *Serg. and Low.* 225; *Hewlett vs. Cruchley*, 5 *Taunt.* 277.

BUCHANAN, C. J., delivered the opinion of the Court. Looking to the evidence in this case, it is perfectly clear, that the writ of *capias ad satisfaciendum*, on which the defendant in error is alleged to have been maliciously arrested, issued irregularly, and illegally. Where goods taken under a *fi. fa.* have been sold, for a part of the amount * due on the judgment, a *ca. sa.* cannot be legally issued for the residue, until the sheriff has made a final return of the *fi.* **385** *fa.* showing what had been done with the property. For as the second writ is grounded on the first, and the return thereof, and must recite the proceedings thereon, the first must be returned before the second can issue. And it is proper and necessary to the security of the defendant, that it should be returned in term time, in order that he may have a day in Court, to protect his rights. If it was otherwise, it would be in the power of a sheriff, or of a plaintiff by collusion with the sheriff, to practise great abuses. But when there is a return of the *fi. fa.* by which it is seen, what has been done with the property seized under it, there is something to control the sheriff, and to restrict the plaintiff to the amount for which he is entitled to have the body, by showing how much he has already received. A *fi. fa.* therefore, is always made returnable in term time, and cannot be otherwise legally returned. And if it be returned to the clerk's office, at any time during the recess, it is in law wholly void, and as no return, and a *ca. sa.* cannot legally be founded upon it. The same principle applies to a *venditioni exponas*, which was issued on a return by the sheriff, "that goods taken under a *fi. fa.* are on hand for the want of buyers." And the *ca. sa.* in this case was sued out, on a return of a *venditioni exponas*, to the clerk's office, during the recess of the Court, which the law did not authorize.

It has been urged at bar, that the action is misconceived, and should have been *trespass vi et armis* for false imprisonment. But we think there is nothing in that objection, and that the Court below did right in refusing so to instruct the jury. If the plaintiff in the

appeal, did maliciously procure the *ca. sa.* to be issued, and the defendant to be arrested under it, case, for such malicious arrest, is the appropriate remedy, the process issuing from a Court of competent jurisdiction. It is not *res nova*. The principle upon which such

386 actions are sustained, is a familiar one in * the books, and too well settled to require to be discussed here. But the foundation of the action being malice, and a want of reasonable or probable cause, which must be proved, and the fact of malice, being always a question for the jury, the instruction, that the *ca. sa.* issued irregularly and illegally, and that the "arrest of the defendant in the appeal under it, was a sufficient ground to support the present action," was wrong, if the Court intended to say, that the arrest alone, with or without malice, was sufficient to entitle him to recover; and also because it took from the jury the question of malice.

Malice may be, and most commonly is in such actions, implied from the want of reasonable or probable cause, that being first established. But the presumption of malice, resulting from the want of probable cause, is not conclusive, and the defendant, for the purpose of rebutting the inference of malice, for instance, as was attempted in this case, may be let in to show, that he acted under the advice of counsel; and whether he acted maliciously and for the purpose of oppression, or not, is a conclusion to be drawn by the jury from all the circumstances of the case. And if he can prove, or if it can fairly be inferred, from all the circumstances of the case, that he was not actuated by malice, or any improper motive, it will be an answer to the action; because it disproves that, which is of the essence of it, the malice, without which it cannot be supported. But in an action for a malicious prosecution, or a malicious arrest, as this is, it is not enough as has been supposed, for the defendant merely to show that he acted under professional advice, the want of probable cause having been first established. He may have done that, and believed that he acted legally, and yet have acted maliciously, and for the purpose of oppression. And having acted maliciously and oppressively, and without reasonable or probable cause, his belief alone, that he acted legally, will not support him in his malicious and oppressive violation of the law. However far his taking * profes-

387 sional advice, would go, if standing alone, to show the absence of malice, and a desire to act legally and correctly; yet it is evidence only to go to the jury for that purpose, and may be rebutted by other surrounding circumstances, the whole of which should go to the jury.

Evidence of the conduct, and declarations of the defendant, in relation to, and in the course of the transaction; of the situation of the parties; of the nature and extent of the injurious means resorted to by the defendant to effect his object, and of the forwardness, zeal, and activity manifested in the procurement, and use of the means employed, may properly be adduced to prove malice. And although,

where a party has acted *bona fide*, and without malice, under professional advice and direction, which he believed to be sound, he is not liable, notwithstanding such advice was in fact incorrect, as malice express, or implied, must be proved—yet he cannot shelter himself under the direction and advice of counsel merely, against evidence of purposed malice, or from which malice may fairly be inferred. And whether he acted with a fair *bona fide* intention, or by what motive he was really actuated, is always a question purely for the consideration of the jury.

It is generally true, that in an action for a malicious prosecution, or a malicious arrest, malice, and the want of reasonable or probable cause, and also the determination of the prosecution, or of the suit, in which the writ was sued out, must be averred in the declaration, and proved at the trial. And it is objected that the defendant in the appeal, is not entitled to recover, under the declaration in this cause, there being no averment, either of the want of probable cause, or of the final disposition of the *ca. sa.* under which he is stated to have been arrested.

As respects the manner of declaring, it seems to us, that this is distinguishable from the case, either of an action for a malicious prosecution, or of the ordinary action for a malicious arrest. The reason why, in the former, the want of probable cause, and the determination of the prosecution must be averred, and proved, is, that otherwise the plaintiff * might recover in the action, and yet be guilty, and afterwards be convicted of the original **388** charge. And in the latter, that he might recover in the action for a malicious arrest, and yet the suit in which the writ was issued, under which he was arrested, be afterwards determined against him. And thus in either case, the actual existence of probable cause established, after a recovery against a defendant who was not in fault; and against whom there could only be a recovery, in the one case, on the ground that he had no probable cause for instituting the prosecution; and in the other, for instituting the suit. But if in this case, the *venditioni exponas*, and the irregular return of it to the clerk's office, during the recess of the Court and out of term time, had been set out in the declaration, with the *capias ad satisfaciendum*, (founded upon that return and) issued before the return day of the *venditioni exponas*, under which the defendant in the appeal was arrested and put into prison—the reason requiring an averment of the want of probable cause, and of the determination of the prosecution in an action for a malicious prosecution, and of the determination of the suit in the ordinary action for a malicious arrest, would not have existed; the want of probable cause existing apart from, and not depending upon any disposition that might afterwards be made of the *ca. sa.*; and the law declaring that no *ca. sa.* can issue, before the regular and final return of the writ upon which it is founded: and the return of the *venditioni exponas*, and the recital

of it in the *ca. sa.* showing that there was no such legal return, and consequently that the *ca. sa.* was irregularly issued, and without any reasonable or probable cause. But the declaration not being so framed, and there being no averment of the want of probable cause, and of the final disposition of the *ca. sa.* there is no cause of action shown in the declaration, on which the defendant in the appeal is entitled to recover.

It is not upon the evidence, but upon the pleadings and evidence applicable to the pleadings, that a plaintiff can recover in any case.

389 It is therefore, always necessary, * that the declaration should set out a good and sufficient cause of action, to be judged of by the Court, otherwise it is in vain to look to the evidence in the cause, upon which there can be no recovery, without a case made in the declaration. This declaration sets out no such cause of action. It merely alleges the issuing of a *ca. sa.* and that the defendant in the appeal, was arrested under it. But it does not show any irregularity in the issuing of it, nor supply the defect, by averring the want of probable cause, and the final disposition of it. And for any thing appearing in the declaration, the *ca. sa.* may have been regularly issued, and the defendant in the appeal properly arrested under it. And it is only by looking out of the declaration, to the evidence stated in the record, that any cause of action can be perceived. For which reason, and also because the Court instructed the jury, that the arrest of the defendant in the appeal under the *ca. sa.* was a sufficient ground to support the present action, the judgment must be reversed.

Judgment reversed, and the death of the appellee having been previously suggested, a procedendo was refused.

GREEN, Executrix of GREEN vs. JOHNSON *et ux.*—December, 1831.

The inventory of a deceased testator's estate, and the accounts thereof, as filed in the Orphans' Court by his executor, are admissible evidence in an action of assumpsit, brought by a child of the deceased, against the executrix of such executor; the latter having been the guardian of the child, and the object of the suit being to recover property of the ward, which he as guardian, was charged with having converted to his own use, and assumed to pay upon the liability resulting from the conversion. To such an action, the Act of Limitations is a bar, after the lapse of time required by its provisions, there being no evidence to rebut it. (a)

(a) Cited in *Weaver vs. Leiman*, 53 Md. 718, and *State vs. Henderson*, 54 Md. 848. In the latter case the Court said: "From the moment the ward reaches the age when the law makes him free, what the guardian owes the ward becomes a debt for which he may immediately sue. All money due him and property belonging to him are from that moment legally demandable, and he may sue the guardian on his bond for its payment and delivery.

In a Court of law there is no such head of pleading as trusts. (b)

By the common law a *cestui que trust* has no standing in Court, in *propria persona*, he can only assert his rights in a Court of Chancery. (c)

* Courts of common law, to prevent fraud and injustice, will protect the rights of *cestuis que trust*; but this is done in the exercise of a *quasi* equitable jurisdiction, as where an appeal is made to the justice and discretion of the Court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea. (d) **390**

An action of account is the only action that can be brought against a guardian, *qua* guardian, in a Court of law, other than an action on his bond. (e)

Limitations apply to the action of account. (f)

As soon as a trust ceases to be a continuing subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the Act of Limitations begins to run. (g)

The case of *Grant vs. Bell*, 4 H. & McH. 419, overruled.

APPEAL from Charles County Court. This was an action of assumpsit, commenced by the appellees, James Johnson, and Mary his wife, (formerly Mary Coomes,) on the 17th of August, 1826, against the appellant, Elizabeth Green, executrix of James R. Green, deceased, which said James R. Green, and Teresa his wife, also deceased, were the executors of William Coomes, the father of

The right of action being then complete, the statute begins to run from that time. So soon as the ward arrives at age, the guardian is bound to pass his final account and pay over." In *Weaver vs. Leiman* it is said that in *Green vs. Johnson*, "the Court expressed in very strong terms its disapproval of all attempts to remove the safe-guards, and fritter away the provisions of this most important statute, by judicial refinements and subtle exceptions, or to increase the number of interpolations or constructive innovations that have already been engrafted upon it."

(b) Approved in *Planters Bank vs. Farmers Bank*, 8 G. & J. 468.

(c) Cited in *Denton vs. Denton*, 17 Md. 407; *Hall vs. Bryan*, 50 Md. 211.

(d) Cited in *Wallis vs. Dilley*, 7 Md. 250; *Shriner vs. Lamborn*, 12 Md. 175; *Groshon vs. Thomas*, 20 Md. 247. See *Owings vs. Low*, 5 G. & J. 134.

(e) Cited in *Hamilton vs. Conine*, 28 Md. 641.

(f) See *McKaig vs. Hebb*, 42 Md. 227; *Weaver vs. Leiman*, 52 Md. 718.

(g) Approved in *Young vs. Mackall*, 4 Md. 375; *White vs. White*, 1 Md. Ch. 56; *Young vs. Mackall*, 3 Md. Ch. 407. In *Weaver vs. Leiman*, 52 Md. 718, the following propositions are laid down. 1st. As a general rule the Statute of Limitations is a bar to a bill in equity for an account, just as it is a bar to an action of account in a Court of law. 2nd. But if a *cestui que trust* demands in equity an account from the trustee, and there is an express, subsisting and recognized trust, neither the period of limitations prescribed by statute, nor length of time, is a bar to relief. 3rd. If, however, there is merely an implied or constructive trust, arising by operation of law, Courts of equity will, as a general rule, follow and obey the law by applying the statutory limitation of time. See *Fishwick vs. Sewell*, 4 H. & J. 311, and cases cited in note (a).

the appellee, Mary. The present action was brought to recover a sum of money, alleged to be due the appellee, Mary, from her guardian, the testator of the appellant, J. R. G.

The pleadings and evidence in the cause, are fully stated by the learned Judge, who delivered the opinion of this Court.

From the verdict and judgment of the County Court in favor of the plaintiffs, the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EABLE, ARCHER, and DORSEY, JJ.

Stonestreet, for the appellant, cited 2 *Stark. Ev.* 900; *Bloodgood vs. Kane*, 7 *Johns. Ch.* 90.

C. Dorsey, and *Brauner*, for the appellees, cited *Kelly vs. Greenfield*, 2 *H. & McH.* 144; *Grant vs. Bell*, 4 *Ib.* 419.

391 * DORSEY, J. delivered the opinion of the Court. The declaration in this case contains four counts. The first, for sundry matters properly chargeable in account. The second, for money paid, laid out and expended; for money lent, and advanced; for money had and received; and on an *insimul computassent* with the defendant's testator. The third count charges, that James B. Green, was appointed in 1804, guardian to Mary, one of the plaintiffs, and as such, possessed himself of all the personal estate of his ward, consisting of negroes, horses, and other stock; and received therefrom the increase, hires, issues, and profits of said property, amounting in the whole to the sum of \$2,000. That not regarding his duty, he wholly refused to pay over this property, or any part thereof, but converted the same to his own use; by reason whereof, he became liable to pay, and being so liable, promised to pay the said sum of money when requested. The fourth is on an *insimul computassent* with the defendant as executrix. To this declaration, the defendant pleaded *non assumpsit* by the testator: *non assumpsit* by the defendant's executrix; *non assumpsit infra tres annos*, by the testator; and *non assumpsit infra tres annos*, by herself. Issues were joined on these pleas; and an account in bar was filed by the defendant, to which *non assumpsit*, and limitations being pleaded, issues were taken thereon. After the evidence had gone to the jury, consisting of the inventory of William Coomes' personal estate, appraised for distribution in 1805, and distributed accordingly at that time, the share of the plaintiff Mary, consisting of specifics, valued at \$585.41, and of the final account of William Coomes' estate, passed by the testator; and of his account as guardian to Mary, passed in December, 1809, shewing a balance of £231 7s. 5d. and of the proof that she arrived to the age of sixteen in October, 1809, and that she lived, during the years of 1810 and 1811, in the family of the testator; and that \$100 per year, was a reasonable charge for board during that period; which two years'

board, formed one of the * items in the account in bar; the plaintiffs prayed the Court to instruct the jury, that the defendant was not entitled to the allowance claimed for Mary's board, under the pleadings in this cause; which instruction the Court gave; and in their doing so, we see nothing to disapprove. The defendant thereupon prayed the Court to instruct the jury, that the plaintiffs were not entitled to recover in this action, if they should be of opinion from the evidence in this cause, that the cause of action had been more than three years standing, "previous to the impetration of the original writ in this cause." But the Court were of opinion, and instructed the jury, that limitation was no bar to the recovery in this action. To which the defendant excepted.

The plaintiff having offered as evidence to the jury, the inventory of William Coomes' estate, and the several accounts passed with the Orphans' Court by the testator, and Teresa his wife, executrix, of William Coomes, the defendant objected to their admissibility. But the Court, and we concur with them in opinion, overruled the objection. This forms the defendant's second exception.

In the third bill of exceptions, the defendant prayed the Court to instruct the jury, that unless they should find from the testimony, that James R. Green or his executrix, made some assumption, or acknowledgment of the debt, within the three years next before the impetration of the original writ in this cause, the plaintiffs were not entitled to recover. Which opinion the Court refused to give; and to such refusal the defendant excepted. Were the County Court right in refusing the defendant's prayers, in the first and third bills of exceptions, and instructing the jury, "that the Act of Limitations is no bar to the recovery of this action?" are the questions we are called on to consider.

To sustain the decision of the Court below, it has been urged in the argument, that the defendant's testator, being the guardian of the plaintiff Mary, held the property for which this action was instituted as her trustee; and that the Statute of Limitations presents no bar to a trust. But to this * doctrine we cannot assent. If sitting as a Court of equity it might deserve some consideration. But in the character in which we now sit, we know of no such head of pleading as trusts. By the common law, a *cestui que trust* has no standing in Court, in *propria persona*; he can only assert his rights in a Court of Chancery. The plaintiffs, by insisting that the defendant stands to them in the relation of trustee, surrender their right of action, unless by some statutable provision they are made competent to enforce it. It is not pretended, that any such enactment exists. It is true that Courts of common law, to prevent fraud and injustice, will protect the rights of *cestuis que trust*; but it is done in the exercise of a *quasi* equitable jurisdiction—where an appeal is made to the justice and discretion of the Court, by way of motion, the matter whereof cannot be insisted on as a legal right, or

presented in the form of a plea. Suppose that instead of taking issue on the plea of limitations, the plaintiffs had replied, that they ought not to be barred, &c. because the defendant was their trustee, &c.; could such a replication, on demurrer, be sustained for a moment? For such a plea, as far as our researches have extended, no precedent can be found. But if the plaintiffs designed to sue in their character of *cestuis que trust*, they should have so presented their cause of action in the declaration, that the question on the plea of limitations, might have been met by a demurrer. Except the point arise on demurrer, that which can be relied on as a defence against the Statute of Limitations, must be pleaded in bar to its operation; and it is not admissible in evidence for that purpose, unless put in issue by the pleadings in the cause. To the first, second, and fourth counts, therefore, the plea of limitations is a conclusive bar. Is it not equally so, as to the third count? The defendant's testator is there charged, with having received the property of the plaintiff Mary, as her guardian, and converting the same to his own use, and in consideration thereof, promising the plaintiffs to pay them \$2,000. What is it, that is sought to * be recovered under this count? Is it the property

394 which the guardian had been in possession of as a trustee? No—It is a sum of money, an equivalent therefor, which the guardian has promised to pay to the plaintiffs; and the payment of which vests in him, and those claiming under him, an indefeasible title to such property. With respect to the sum of money thus promised, can it be pretended that the testator held it as a trustee? Has it a single attribute of a trust? On the contrary, is it not a contract strictly legal, which can be sued on in a Court of law, and no where else. To such a cause of action, the Statute of Limitations must be available as a bar.

But waiving all advantages which the pleadings of the plaintiffs, give to the defence taken by the defendant; and assuming that the present were an action of account, which is the only action other than one on his bond, that can be brought against a guardian, *qua*, guardian, in a Court of law; would the condition of the plaintiffs, as respects the plea of limitations, be changed for the better? In our opinion it would not. The Act of Assembly is explicit, is positive; it leaves nothing on the subject, on which conjecture or freedom of construction can operate. "All actions of account, shall be sued within three years, ensuing the cause thereof." It has justly been denominated "a statute of repose;" and is one of the most important, and beneficial legislative enactments which our statute book contains. This is not the epoch, when that salutary protection, which the Legislature have wisely thrown around us, as a safe-guard against fraud and oppression, should be frittered away by judicial refinements, and subtle exceptions that never entered into the contemplation of its enlightened framers. For many years it has been a subject of avowed and sincere regret, with the most distinguished Judges, and eminent

jurists of the age, that any constructive innovations were ever engrafted on this statute. We certainly are not disposed to increase the number of such interpolations.

* The cases met with in the books, which have given birth to the notion, that trusts form a new exception to the Statute of Limitations, warrant no such conclusion. The questions have been, not whether being within its letter, they were excluded by the spirit of the statute, and were therefore excepted from its operation, but whether they came within its letter. If A place merchandise in the hands of B, to be sold for the use of A, and B not selling, retain possession for seven years, when A demanding a return, and being refused, brings trover or replevin for the goods, the plea of limitations would be no bar to a recovery; because until the demand, he had no cause of action, and therefore the case is not within the letter of the statute. But if the demand and refusal, had been within one year after the delivery, then the plea of limitations would be a bar; a cause of action existing from the time of the demand, it is clearly within the express terms of the statute. As soon as a trust ceases to be a continuing subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the Statute of Limitations begins to run. The moment a ward is emancipated from the authority of his guardian, by reaching the age prescribed by law, his cause of action is complete. The relation which existed between them, ceases to be a subsisting trust; an action of account may be immediately instituted in a Court of law, and from that time, the Act of Limitation dates the commencement of its operation. The saving in favor of infancy, gives to females after arriving at the age of twenty-one years, the same time for the assertion of their rights, that is allowed to the other sex.

Should the doctrine which prevailed in the Court below be sustained, what prudent man would consent to be a guardian? His accountability would not be a termination. Fifty years after the deaths of both guardian and ward, the representatives of the latter might sue those of the former, in a Court of law, and require proof as to the mode, in which * the property of the ward had been managed, and paid over; and the Statute of Limitations would afford no protection. By the restriction which we have deemed applicable to the rights of the ward, he is subjected to no inconvenience or injury. The same measure of justice which is extended to every other adult in the community, is conceded to him; and he has other remedies, and three distinct tribunals, where ample justice can be obtained. If by his unreasonable *laches* in regard to time, he does not forfeit all claim to redress, he can obtain full relief by proceeding, against his guardian, in the Orphans' Court; or by suit on his guardian's bond in a Court of law; or by calling on him to account for his stewardship in a Court of Chancery.

If however, in a proper state of pleadings to raise the question, the pleas of limitation would form no bar to the plaintiff's right of recovery in this action, were the Court under the issues joined in the cause, justified in refusing the defendant's prayers, in the first and third bills of exceptions? Had the plaintiff designed to urge this objection to the pleas, he ought either to have demurred to them, or if allowable in pleading, by his replication to have set out the matter of avoidance, by which he sought to evade the operation of the bar. Instead of doing this, he took issue on the pleas, and thereby admitted their legal sufficiency, and applicability. The question then for the determination of the jury, was the truth of those pleas. With their effect they had nothing to do. The plaintiffs had confessed upon the record, that if true, the jury must find a verdict against them. The instructions asked for, were of nothing more than was admitted on the record; and consequently the Court were bound to have given them. By the instruction which was given, the jury were in effect, directed, that although they should find the facts in issue, in favor of the defendants, yet, that they were bound to render their verdict for the plaintiffs.

The only case we have met with appearing at all to conflict with any of the views we have taken of the case before * us, is that
397 of *Grant vs. Bell*, 4 H. & McH. 419, decided by the late General Court, at October Term, 1799. The plaintiff there having brought an action for money had and received, to which *non assumpsit* and limitations were pleaded, "gave evidence to the jury, that the defendant as his agent, had received the sum of £78 for the rent of certain lands belonging to the plaintiff, and which the defendant had rented out for him. The defendant then proved that £40 14s. part of the said sum of £78 had been received more than three years before the action was commenced; and thereupon prayed the Court's instruction that the plaintiff could only recover, what was received within the last three years. But the Court were of opinion that the Statute of Limitations was no bar to any part of the plaintiff's claim. For this laconic opinion no reasons are assigned. If, as has been contended for in the argument, the General Court regarded this case as a case of trust, and therefore, not within the spirit of the statute, they would have so stated; and not left this opinion of less than three lines, to rest, as to the principle on which it turned, on vague conjecture. If, as is more probable they regarded Bell as holding this money under a continuing trust, and that he was not bound to pay it over without delay, we cannot concur with them in opinion. There is nothing to shew that it was the intention of Grant and Bell, that the latter should keep possession of the money received, for the purpose of investment, or any other appropriation. On the contrary, we conceive that there was an implied engagement, a legal obligation on the part of Bell, when a payment was made to him, without delay to pay it over to Grant, and not retain it in his hands without

object. That having failed to do this, Grant had an immediate right of action against him; and that there was nothing in the relative situation of the parties, which could postpone the operation of the Act of Limitations. We do not therefore, hold ourselves bound by the authority of that case, even admitting that its * circumstances were more analogous to those of the case at bar, than 398 they appear to be.

We concur with the County Court in their opinion in the second bill of exceptions; but dissenting from their opinion, and refusal of the defendant's prayers, in the first and third bills of exceptions, we reverse their judgment. *Judgment reversed, without procedendo.*

COWMAN *et al.* vs. SARAH HALL. GLENN, Adm'r of HALL vs. SARAH HALL.—December, 1831.

H. in 1789, and in consideration that his mother would pay him £100 over his part of his father's personal estate, and all the debts due from her deceased husband, and also procure H. a conveyance in fee of certain lands, agreed with her, as a provision for the younger children of the family, to convey to her or her heirs, or to such of the younger children and their heirs, as she should from time to time appoint, certain other lands of which he was seised. A few days after this, H. married. Upon a bill filed in 1826, by his widow for dower, it appeared, that the mother in 1789, went into the possession of the land which H. had agreed to convey—that in 1807, H. uniting with his mother, executed deeds for this land to the defendants, and that the deeds with the agreement were put on record at the same time—*Held*, that it appeared that the mother had complied with her part of the agreement, and was entitled to the conveyances from H. clear of any claim for dower on the part of his widow.

A widow is not dowerable in equity of lands which were held by her husband in the character of trustee. (α)

Where a bill for dower alleged that the complainant's marriage with her deceased husband took place "on or about the year seventeen hundred and —," and called upon the defendant to answer whether "she was not married as stated." And the answer after setting out an agreement of the 14th January, 1789, alleged that "the marriage took place some time after that agreement," it was *held*, that this allegation, both as respects the fact and time of marriage, was responsive to the bill, and must stand as conclusive of those facts, not being contradicted by any evidence.

* APPEAL from the Court of Chancery. On the 11th of August, 1826, the appellee filed her bill against Henrietta 399 Hall, since deceased, alleging, that on or about the year seventeen hundred and — she intermarried with a certain Richard Hall of Edward, who at the time of said intermarriage was seized in fee, of certain lands in Anne Arundel County, described in exhibits A and

(α) See *McCauley vs. Grimes*, 2 G. & J. 194.

B, filed with and made parts of her bill. That she thus became entitled to dower in said lands, upon the death of her husband, who departed this life on or about the — day of January, 1823; she never having in any way relinquished her dower in the same. That the said Henrietta Hall, as devisee of one Edward Hall, (since dead) named in exhibits A and B, is, and for some time past, has been in possession of said lands, claiming them under the said Edward in fee, and refuses to assign the complainant her dower therein, and to pay her her proportion of the rents and profits thereof. The bill then prays that the defendant may answer the premises, as if particularly interrogated, and especially whether the complainant was not married to the said Richard Hall of Edward as stated, &c. That her dower may be assigned her by the Court, and the defendant be decreed to pay her proportion of the rents and profits of the land.

The answer of Henrietta Hall admits the death of Richard Hall of Edward, and his marriage with the complainant; and says that on or about the 14th of January, 1789, the said Richard Hall of Edward, and a certain Martha Hall, entered into articles of agreement, (referred to as exhibit A, in another cause then depending in the Court of Chancery,) by which it was stipulated between the parties, that said Martha was to pay him, the said Richard, the sum of £100, over and above his part of his father's personal estate; to pay all debts due from said estate, and to procure him the said Richard, and his heirs, a conveyance in fee simple, for certain lands purchased of Thomas H. Hall, and to deliver him Richard, the immediate possession thereof, * &c. Then the said Richard, in consideration thereof, and as a provision for the younger children of the family, agreed to convey to the said Martha and her heirs, or to such of the younger children, brothers or sisters to the said Richard, as the said Martha should, from time to time direct and appoint, sundry lands in such agreement mentioned, &c. The answer further states, that the said Martha faithfully performed her part of the said agreement, and that in compliance therewith, and by the direction and appointment of the said Martha, the deeds in complainant's bill referred to, were executed by her, the said Martha Hall, and the said Richard Hall of Edward, to the said Edward Hall, the son of the the said respondent, and younger brother of the said Richard Hall of Edward. The answer then alleges, that the complainant was married to her aforesaid husband, some time after the said agreement was executed.

Exhibits A and B were certified copies of deeds recorded in the office of the clerk of Anne Arundel County, both bearing date on the 13th day of July, 1807, from Martha Hall and Richard Hall, to Edward Hall, younger brother to said Richard, the first containing 250 acres of land, described by metes and bounds, courses and distances; the second conveying a tract or parcel of land called Chancey's Reso-

lution, containing 400 acres, and a parcel of land containing 25 acres, called Wade's Increase.

The exhibit filed in the case against Glenn, adm'r of Hall and Julius Hall, was a similar deed from the same parties, dated on the same day, conveying to Thomas W. Hall and John Hall, also younger brothers of Richard Hall, several other tracts of land called Maddox's Adventures, Arnold Grey, Happy Choice, and other adjacent tracts. This latter bill was for dower in those lands, and the pleadings and proofs in both cases were the same.

Upon the death of Henrietta Hall, the proceedings were revived against her representatives, the present appellants.

Commissions issued to take testimony, under one of which the following agreement referred to in the answer of Henrietta Hall, was proved and returned.

* "Mem. of agreement made this 14th day of January, 1789, between Richard Hall, son of Edward, of Anne Arun-
del County, in the State of Maryland, gentleman, of the one part, and Martha Hall of the same county and State, widow of the said Edward, of the other part, witnesseth, that the said Richard Hall, for and in consideration that the said Martha hath agreed to pay him one hundred pounds, current money, over and above his part of his father's personal estate; and hath agreed to pay all the debts due from her deceased husband, and hath also agreed to procure him the said Richard and his heirs, a conveyance in fee simple, for all the lands purchased of Thomas H. Hall, and to deliver him immediate possession thereof, &c. The said Richard Hall, in consideration thereof and as a provision for the younger children of the family, hath agreed, and doth hereby bind, and oblige himself and his heirs, to convey to her, the said Martha Hall, or to her heirs or to such of the younger children, brothers or sisters to the said Richard, as she shall from time to time direct and appoint, and to their respective heirs, in fee simple, all the following lands, that is to say: all the land purchased of Benjamin Welch, also all the lands purchased of William Hall, also all the lands purchased of William Ijams, and all the lands heretofore deeded by Henry Hall, deceased, to the said Edward, except the wood land above reserved, together with all the improvements, &c. The same conveyance to be made either in separate deeds or otherwise, at the will, and according to the directions of the said Martha, from time to time, or at any time when by her required. And if no such direction in her life-time, then agreeably to such disposition as she shall make thereof, amongst the said children, by her last will and testament. It is to be observed, that this agreement in no wise obligates the above named Richard, to defend any of the lands by him to be deeded, against any person or persons but those who claim immediately from, by, or under him. In testimony whereof, we * have hereunto set our hands and seals,
the day and year first above written." 401 402

The above agreement was recorded among the land records of Anne Arundel County, on the same day with complainant's exhibits A and B. There was evidence taken under the commission, that all the lands in complainant's exhibit A, are mentioned in the preceding agreement—the agreement, however, does not embrace the tract called Wade's Increase, conveyed by exhibit B.

It appeared by accounts settled in the Orphans' Court, that Martha Hall had overpaid the personal estate of her husband:

BLAND, C. at September Term, 1829, decreed, that the plaintiff Sarah Hall, is entitled to dower in all the lands and tenements in the proceedings mentioned; and directed a commission to issue for the purpose of making an assignment to her of her dower therein. And ordered an account to be taken by the auditor of the amount of the rents and profits, to which she may be entitled, from the period when her right to dower accrued. From this decree the defendants appealed to the Court of Appeals.

These causes were argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Johnson, for the appellants, cited *Diamond vs. Billingslea*, 2 H. & G. 264.

*A. C. Magruder and Murray, for the appellee, cited 2 Eq. 404 *Cases*, 19; *Arden vs. Arden*, 1 Johns. Ch. R. 313; *Swaine vs. Perine*, 5 Johns. Ch. R. 482.

BUCHANAN, C. J. delivered the opinion of the Court. Under the agreement of the 14th January, 1789, between Richard Hall the deceased husband of the complainant, Sarah Hall, and his mother, Martha Hall, by which, for the consideration expressed, he contracted to convey to her in fee, or to such of her younger children, his brothers or sisters in fee, as she should direct, the lands therein mentioned, he became in equity a trustee for his mother, of all the lands embraced by that agreement. And the circumstance of that agreement, and the three deeds of the 13th July, 1807, from him and his mother Martha, for the same lands, two of them to Edward Hall, and the other to Thomas W. Hall, and John Hall his brothers, and the children of Martha, all standing recorded on the same day, and immediately following each other in the same book, together with the deeds being to three of the younger children, for whose benefit the agreement was entered into and their mother having joined in the deeds, to whom, or to whose appointment the lands were contracted to be conveyed, shows satisfactorily, that Martha Hall had complied with the terms of the agreement on her part, and entitled herself to a compliance on the part of Richard Hall, and that the deeds were made in pursuance of that contract. For what other purpose could the agreement have been recorded with the deeds (not

being an instrument required by law *to be recorded,) than 405
 to show the inducement to the deeds, and that it had been
 complied with? And the additional fact appearing in evidence, that
 the lands covered by the agreement of the 14th January, 1789, were
 from the time of the execution of that instrument in the possession
 of Martha Hall, and never from that day in the possession of Richard
 Hall, is worthy of notice, and assists in leading to the conclusion that
 she had performed all that was required of her to be performed, and
 had thereby entitled herself to a conveyance, in pursuance of the
 agreement, whenever she might choose to require it. Or why was
 she permitted to remain in the undisturbed possession and enjoy-
 ment of the premises? which is not accounted for in any other way,
 and as far as appears from this record, can only be accounted for on
 the ground that she was entitled to the beneficial interest. The
 lands were by the contract to be conveyed to herself, or to such of
 her younger children, sons or daughters, as she should from time to
 time direct; and her uniting in the deeds to her three younger sons
 was a good appointment, and equivalent to a direction to Richard
 Hall to convey to them, at a time selected by herself, and which by
 the agreement she had a right to select, and when she thought
 proper to give them the property, and to cause the conveyances to
 be made. And it may be that the deeds were not executed sooner,
 because she did not deem it proper or expedient to have it sooner
 done.

A widow is not dowerable in equity of lands, which were held by her
 husband in the character of a trustee; and as the complainant seeks
 to be endowed of lands, embraced by the agreement between her
 husband and his mother Martha Hall, of the 14th January, 1789, of
 which he, on that day became a trustee for his mother, her right to
 recover must depend on the time of their marriage; and be deter-
 mined according to the fact of the marriage having taken place, be-
 fore, or subsequent to the execution of that instrument, as shown in
 the record.

* In her bill, she alleges that it took place "on or about the 406
 year seventeen hundred and" blank, and calls upon the de-
 fendant to answer, whether, "she was not married as stated." Not
 confining the interrogatory to the fact of marriage alone, but requir-
 ing a response, as well in relation to the time as to the fact of mar-
 riage. And the answer setting out the agreement of the 14th Janu-
 ary, 1789, which is stated to have been faithfully performed, denies
 the complainant's title to dower, and alleges that the marriage took
 place some time after that agreement was executed, that is, some-
 time after the 14th January, 1789, which allegation, both as respects
 the fact, and time of the marriage, is responsive to the bill, and is
 not contradicted by a single witness in the cause. On the contrary,
 the evidence of the only two witnesses who gave testimony upon
 that subject, so far from contradicting, is perfectly consistent with

the answer, and goes to support it. They swear that they were married themselves on the 18th of December, 1788, and that the complainant, and her deceased husband, Richard Hall, were married about one month afterwards, reaching a few days beyond the 14th January, 1789, the date of the agreement, when Richard Hall stood seized of the lands, in which she claims to be entitled to dower as trustee for his mother. But the answer alleging the marriage to have been after the date of the agreement, does not require the aid of that testimony to support it; but being responsive to the bill, and not contradicted, or shaken by any other evidence, must stand, as conclusive of the fact it asserts, that is, that the marriage was after the execution of the agreement of the 14th January, 1789. We are consequently constrained to say, that the complainant is not entitled to dower in any of the lands embraced by that instrument, and of which her deceased husband was at the time of their marriage and afterwards seized only as trustee. But the land described in the deed from Martha Hall and Richard Hall, to Edward Hall, marked Exhibit B, as “part of a tract of land called Wade’s
407 * Increase,” containing about twenty-five acres, not being embraced in the agreement of the 14th January, 1789, and of which Richard Hall was beneficially seized during his coverture with the complainant, and not as trustee, she is entitled to dower in that land.

The decree of the Chancellor therefore, must be reversed with costs, so far as it relates to the lands embraced by the agreement of the 14th January, 1789, between Richard Hall and Martha Hall; and the complainant will be decreed to have her dower, in the other parcel of land described in the Exhibit B, as “part of a tract of land called Wade’s Increase.”

With respect to the case of Glenn, adm’r of Thomas W. Hall, and *Julius Hall vs. Sarah Hall*, which has been submitted to us on the same pleadings and evidence, the whole of the land in which dower is claimed, being embraced by the agreement between Richard Hall and Martha Hall, of the 14th January, 1789, and consequently, held by Richard Hall, at the time of his marriage to the defendant in the appeal, and afterwards, as a trustee only for his mother, the defendant is not entitled to dower in any part of it, and the decree of the Chancellor must be reversed, and the bill dismissed with costs.

Decree.—It was thereupon adjudged, &c. by the Court of Appeals, that the decree of the Chancellor in the case of *Joseph E. Cowman et al. vs. Sarah Hall*, be reversed, with costs to the appellants in this Court, and the Court of Chancery. But it appearing to this Court, that the appellee is entitled to dower in the land described in exhibit B, as part of a tract of land called Wade’s Increase, it was therefore, further adjudged, ordered, and decreed, that the record in this case, be remanded to the Chancery Court, and that the said Court pass such order, and decree therein, as may be necessary to assign dower

to the appellee in the said land, with such rents and profits accruing out of said land as she may be entitled to. *Decree reversed.*

* NATHAN WATERS vs. SAMUEL PEACH.—December, 1831. **408**

In March, 1825, a writ of *fi. fa.* was sued out, which the sheriff returned at the return day. In July, a *vendi.* issued founded upon that return; this being returned and not executed, another *vendi.* was issued, which was returned to April Term, 1827, executed, and the proceeds of the property sold, paid to plaintiff's attorney. At April Term, 1828, the defendant in the execution, moved to quash the last *vendi.* and the return thereto, for various alleged irregularities. *Held*, that the motion not being made at the return term of the writ, nor while the proceedings were *in fieri*, was too late. (a)

APPEAL from Prince George's County Court. On the 10th March, 1825, a *feri facias* issued out of Prince George's County Court, on a judgment rendered in that Court, in favor of the appellee against the appellant. At the return day of the writ, the sheriff returned it—"laid as per schedule and paid \$574.09. Not sold for want of bidders." On the 13th of July, 1825, a writ of *renditioni exponas* issued, commanding the sheriff to expose to sale, one tract of land called Pasture Enlarged, 200 acres: one ditto Osbourn's Lot, and part of Pleasant Grove, 52 acres: part of Duvall's Pleasure, 150 acres: part of Tukesbury, 50 acres: part of Tukesbury and Walker's Delight, 150: part of a tract of land called Friendship, 180 acres: which were stated to have been seized and taken by the said sheriff, under the said writ of *feri facias*. This writ of *renditioni exponas* being returned, "not sold for want of bidders," another writ issued for the same purpose, on the 4th of December, 1826, returnable to April Term, 1827. To this writ, the sheriff at the return term made the following return:—"made by a sale to Doctor Charles Duvall, on the 30th day of December, 1826, of all the interest of the defendant, in and to the following parcels of land, to wit:—one tract of land called Pasture Enlarged, containing 200 acres more or less, one tract of land called Osbourn's Lot, and part of Pleasant Grove, containing 52 acres more or less: one tract of land * called Duvall's Pleasure, or part of Duvall's Pleasure; containing 150 acres more **409** or less: one tract of land called Tukesbury, and a part of Tukesbury and Walker's Delight, containing 150 acres more or less; and a tract of land called Friendship, containing 180 acres, the sum of \$1,350, which has been paid to me by the said Charles Duvall, and by me paid to plaintiff's attorney. George Simms, sheriff." And the sheriff on the day of the return of the said writ, filed in Court

(a) Cited in *Eakle vs. Smith*, 24 Md. 362. See *Estep vs. Weems*, 6 G. & J. 308.

with his said return, the following schedule, to wit:—"A schedule of the property of Nathan Waters, taken in execution at the suit of Samuel Peach, issued from Prince George's County Court,—all his right, title and interest, in the following tracts, or parcels of land, to wit: a tract of land called Pasture Enlarged, containing 200 acres; one do. called Osbourne's Lot, and part of Pleasant Grove, containing 52 acres; part of Duvall's Pleasure, containing 150 acres; part of a tract of land called Tukesbury, and part of Tukesbury and Walker's Delight, 150 acres; and a tract of land called Friendship, containing 180 acres, more or less; and valued by the undersigned at \$5 per acre, this 30th day of December, 1826." Afterwards, at April Term, 1828, the defendant, in the execution named, (the present appellant,) moved to quash the last of the said writs of *venditioni exponas*, and the return thereto, for the following reasons. 1. Because the sheriff has returned to the *fi. fa.* issued in this cause, "levied as per schedule," and no schedule appears to have been returned. 2. Because it does not appear from the said return, that any levy was made before the return day of the *fi. fa.* 3. Because the *venditioni exponas*, under which the sale was made, was a renewal of a previous writ; and said *venditioni exponas*, and return thereto, are variant from the first writ. 4. Because the said writ was irregularly issued. 5. Because the description of the property directed to be sold, is uncertain. 6. Because the description of the property as set out in the advertisement of sale, and sheriff's return is uncertain. 7. Because the * said return is irregular, informal, uncertain and void. The County Court overruled the motion. From this decision the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE and ARCHER, JJ.

Alexander and Stonestreet, for the appellant contended. 1. That it does not appear that the writ of *fieri facias* was tested in term, as it should have been. 2 *Tidd Pr.* 914; *Shirly vs. Wright*, 2 *Salk.* 700; 1 *Sellon*, 520. 2. That the return thereto is void. 3. The original *venditioni exponas* was not warranted by the writ of *fi. fa.* and the return is uncertain upon its face, and the return thereto is also defective. *Shirly vs. Wright*, 2 *Salk.* 699; 2 *Tidd's Pr.* 931; 1 *Sellon*, 520; *Thomas vs. Turvey*, 1 *H. & G.* 435; *Purl vs. Duvall*, 5 *H. & J.* 69. 4. The *alias venditioni exponas* was irregularly issued, and is variant from the original. 5. That the sheriff's return to the last writ is defective, because the sale made by the sheriff, was not made in due form of law; and because it appears that the lands supposed to be sold, are different lands from those which are mentioned in the *alias* writ, and which by said writ, he was authorized, and commanded to sell. They argued that the motion did not come too late, and for that purpose cited 4 *H. & McH.* 291; *Harden and Carson vs. Moores*,

7 H. & J. 4; *Williamson vs. Perkins*, 1 H. & J. 449; 2 Saund. Rep. 68, F, note 2, and 69, C, note 3.

Magruder and Johnson, for the appellee. The objections so far as they relate to mere matters of form, are waived, by the delay in making the motion to set the proceedings aside. *Fletcher vs. Wells*, 1 Serg. and Low. 352. If a writ is taken out in term, it must be tested on the first day of the term; if in vacation, on the last day * of the preceding term. *Arch. Pr.* 284, 297. A return void in 411 part, may be good for the residue. *Hollingsworth vs. Floyd et al.* 2 H. & G. 87; 2 *Caine's Rep.* 354. If therefore, the Court should be of opinion, that the return is imperfect in reference to some of the parcels of land, it is certainly good as to others, and consequently, the whole is not to be set aside. The defects however, were all amendable, and upon the authority of *Fletcher and Wells*, the motion comes too late. 1 *Archbold*, 284, 279; *Berry vs. Griffith*, 2 H. & G. 337. The return to the second *venditioni exponas* is specific, and as all the writs and returns prior to the sale are but one proceeding, the defects of the former, are cured by the latter. *Clark vs. Belmear*, 1 G. & J. 445. They insisted that sales made under judicial process, are considered as made under the authority of the Court, and as sales *nisi*. If the defendant intends to object, he should do so at the return term of the writ, when the money is in the power of the Court, and may be refunded to the purchaser.

ARCHER, J. delivered the opinion of the Court. Entertaining the views which we do, in relation to the time at which the motion to quash the *venditioni exponas*, and sheriff's return has been made, we do not deem it necessary to express any opinion in relation to the various defects which have been insisted to exist, in the *feri facias*, *venditioni*, *alias venditioni*, and the sheriff's returns * thereto. 412 Had the defendant appeared at the term to which the *alias* writ of *venditioni exponas* was returnable, and when the proceedings were *in fieri*, and made his motion to quash them, the regularity and legality of the proceedings would have properly come up for adjudication. But after the term has passed by, when the parties have no day in Court, and the purchaser has paid the purchase money, which has actually passed to the credit of the judgment against the defendant, we apprehend it is too late, for the defendant, in this summary way, to make his motion to set aside the proceedings as irregular, and that too without a rule to show cause, either against the plaintiff, or the purchaser, why the proceedings should not be quashed. The authorities cited from 4 H. & McH. 291; *Williamson vs. Perkins*, 1 H. & J. 449, and *Harden and Carson vs. Moores*, 7 Ib. 4, do not appear to establish the positions for which they were cited. The motions to quash, were in all those cases made, while the proceedings were pending in Court, or at the term to which they were returnable. We have been referred to 2 Saund. 69, note 3, to show, that if an inquisi-

tion upon an *elegit* be void for uncertainty, or because more than a moiety of the lands have been delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain possession of the lands under it, the Court upon a *scire facias* will order the writ to be vacated: and it has been emphatically asked, if the proceedings may after the term, be vacated upon a *scire facias*; why may they not upon motion? The answer is obvious; because in the latter case, after the term, the parties have no day in Court; but upon the former, a day is given.

But why should the Court be called upon at this time, to set aside these proceedings? The purchaser, who is the only person likely to be affected by their illegality, if in fact they be so, (and whether they be, or be not so, we do not mean to intimate any opinion,) is willing to stand by the proceedings, and to rest his title upon them. There exists * no intimation, that by the course adopted by the sheriff in the execution of the writs, any injustice has been done to the defendant. There is certainly no evidence to that effect, and we conceive that such efforts to harass the purchaser, do not merit the encouragement of the Court.

Judgment affirmed.

JOSEPH ROBINSON *et al.* *vs.* PERRY TOWNSHEND *et ux.*—December, 1831.

W. by his last will devised as follows: "I give and bequeath to my daughter A. the sum of \$60, as an annuity, to be paid to her out of the profits of my real estate annually." This is an annuity, and not a rent charge.

(a)

This annuity being in arrear, the devisee filed her bill against the infant devisees of the land, their guardian, and the personal representative of the testator, alleging the annuity to be a charge on the land and its profits, and praying for an account—that the lands may be sold,—the proceeds applied to the payment of the annuity, so far as necessary, and the balance invested to meet future instalments, and for general relief. *Held*, that as the bill contained no allegation or suggestion of the receipt of the rents and profits by the defendants, or any of them, nor of the annual value of the land, nor of the application of the rents and profits, and did not call upon the defendants to make any disclosures upon these subjects, there was no issue, to which evidence, which had been taken in the cause in relation to them, could apply, and that there could be no decree *in personam* against the defendants, under this state of the pleadings.

The neglect of a defendant to answer a bill, upon which a decree *pro confesso* is passed, amounts to an admission only of the allegations in the bill. (b)

(a) See *Ehrman vs. Mayer*, 57 Md. 612; *Moale vs. Cutting*, 59 Md. 510.

(b) See *Warfield vs. Gambrill*, 1 G. & J. 283.

The answer of infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged, and entitles them only to a decree on the case made in the bill, when proved.

APPEAL from Chancery. On the 17th August, 1826, a bill was filed by the appellees, Perry Townshend and Anne Maria, his wife, formerly Anne Maria Duncan, against the appellants, Joseph * Robinson, William J. B. Duncan, Caroline Duncan, and **414** Thomas Iglehart, administrator *d. b. n.* of William Duncan, deceased. Upon the death of Thomas, after the commencement of the suit, John Iglehart, who took out letters of administration, *d. b. n.* on W. Duncan's estate, was made a defendant in his stead. The bill alleges that the late William Duncan, the father of the complainant Anne Maria, died about the 25th March, 1819, having first duly made and published his last will and testament, and leaving the complainant Anne Maria, his only issue, by a first marriage, and two children, William J. B. Duncan, and Caroline Duncan, both then and still minors, the issue of a second marriage, and a widow Deborah, whom he constituted the sole executrix of his will. That by said will the testator devised his real estate, lying in Anne Arundel County, to William J. B. Duncan and Caroline Duncan, as joint tenants; and gave to the complainant Anne Maria, an annuity chargeable thereon of sixty dollars a year, as appears by said will, exhibited and made part of the bill. That said Deborah, the executrix, before her death, paid complainant Anne Maria, but one year's annuity, and that Joseph Robinson (one of the appellants,) who has been appointed by the proper authority, and now is guardian to the aforesaid infants, has also paid but for one year, and that he, the infants, and Iglehart the administrator *d. b. n.*, all refuse to pay anything more on account thereof. That said annuity is now in arrear for several years, and inasmuch as the same is made a charge on the lands mentioned in the will, and the profits thereof; prayer, that an account may be taken, that the said land may be sold, and the proceeds applied to the payment of said annuity, as far as may be necessary, and the balance invested to meet future instalments thereof, and for general relief.

The will of William Duncan, dated 26th December, 1818, and proved on the 30th March, 1819, exhibited with the bill, contained the following provisions: "I give and devise unto my daughter Caroline Duncan, and my son * William J. B. Duncan, the plan- **415** tation on which I now dwell, consisting of several tracts, or parts of tracts of land, called, &c. being contiguous to each other, and containing in the whole 229½ acres, between them, share and share alike, as joint tenants, and not tenants in common." "Item, I give and bequeath to my daughter Anne Maria Duncan, the sum of \$60 current money, as an annuity, to be paid to her out of the profits of my real estate above mentioned, annually, for and during

the term of her natural life, withholding from her however the power of selling or transferring the above mentioned annual allowance to any person or persons whatever, under penalty of forfeiture."

The infants, Wm. J. B. Duncan, and Caroline Duncan, by the guardian, answered, saying, they know nothing of the matters alleged in the bill, and put the complainants to the proof of them.

The other defendants did not answer. And after an interlocutory decree against them, the case was referred to the auditor, with directions to report to the Chancellor, the whole value of the lands in the proceedings mentioned, the annual value thereof since the death of the testator; and by whom, if by any one, the rents and profits have been received, and the amount thereof; the amount of the arrearages of the annuity with interest, and the age, and general state of health of the plaintiff, Anne Maria Townshend, from the proceedings, and such proofs as may be laid before him. And the parties were permitted to take the depositions of witnesses before a justice of the peace, on giving three days' notice as usual to the opposite party, or his solicitor. In obedience to this order, the auditor took proof, touching the several matters thus referred to him, and on the 13th August, 1829, reported an account, charging Deborah Duncan, with the annuity to the complainant Anne Maria, from the 4th March, 1820, to 4th October, 1824, (when she died,) amounting, with interest to the date of the report to \$354.16; and charging Joseph Robinson with the arrearages which accrued after the death of said
416 * Deborah. There were also some depositions relating to the same matters, taken before a justice of the peace, agreeably to the above order.

The defendants excepted to the report of the auditor, upon the ground, among others, "that there was no evidence in the cause duly and regularly taken, according to the course of Chancery proceedings, by which the defendants can in any wise be charged or affected, or any decree passed against the infant defendants, touching or concerning the interests of said infants, or said Robinson, in the land, in the bill mentioned, or otherwise.

BLAND, C., August 17th, 1829. This cause standing ready for hearing, and having been submitted on the notes of the solicitors of the parties, the proceedings were read and considered.

William Duncan, having a wife and three children, and being possessed of some personal property, and seized of a tract of land containing about 229 acres, on the 26th of December, 1818, made his will and had it legally attested by three witnesses, by which, he devised all his real estate to his two infant children, Caroline Duncan and William J. B. Duncan, as joint tenants; and also gave them all his personal property, and to his other child he gave in these words: "Item. I give and bequeath to my daughter Anne Maria Duncan, the sum of sixty dollars, current money, as an annuity, to be paid to

her out of the profits of my real estate above mentioned, annually, for and during the term of her natural life, withholding from her however, the power of selling or transferring the above mentioned annual allowance, to any person or persons whatever, under penalty of forfeiture." On the 4th of March, 1819, without having made any alteration of this his will, he died, and the will was soon after proved in the usual form, by two of the subscribing witnesses. Deborah Duncan, the widow, qualified as executrix under the will, and was the guardian of the infant children, and after her death, which happened *some time in the latter end of the year 1824, Joseph Robinson was appointed guardian to the two infant children, **417** and administration *de bonis non* was granted to Thomas Iglehart. Upon this state of things, Anne Maria, with her husband Perry Townshend, on the 17th of August, 1826, filed their bill against Iglehart, Robinson, and the two infant children, alleging that the annuity has not been paid, and praying that the arrears might be decreed to them, and that the land might be sold for the payment thereof. The infant defendants answering by a guardian *ad litem*, admit nothing, and put the plaintiffs upon the proof of their case. The defendants, Iglehart and Robinson, having failed to answer, the usual interlocutory decree for the default was passed against them, after which Thomas Iglehart died; and administration *de bonis non* of the estate of the late William Duncan, was granted to John Iglehart; and this suit having been revived against him, and he having failed to answer, an interlocutory decree for the default went against him also, after which the case was submitted for a final decision; but conceiving that some further information was indispensably necessary to enable me to frame such a decree as was best suited to the nature of the case, I passed the order of the 21st of February, 1828, in answer to which the auditor made his report of the 26th May, 1829.

The defendants have excepted to the auditor's report of the 26th of May last, for several causes. 1st. Because they had not the credits to which they were entitled, which, so far as it relates to the sum of twenty dollars, since admitted to have been paid by the late Deborah Duncan, is well founded. The next special exception of the defendants to that report of the auditor, is, that there is no evidence whatever, in the cause, duly and regularly taken, according to the course of Chancery proceedings. It was the well settled practice of the Court of Chancery of Maryland, under the Provincial Government, and has continued to be so ever since the establishment of the Republic, without any doubt or interruption, that in all cases where an *account was required by the Court, or the parties, a special commission might issue, directing the commissioners to **418** take testimony; "and also to state, audit, settle and adjust all accounts relating to the matter in dispute, that should be produced to them," and to reduce into writing such account, and to return the

same with the depositions of the witnesses. *Pro. Chan.* 1762, *lib. D. D. No. 1*, 315. The Act of 1785, ch. 72, sec. 17, which authorized the Court to appoint an auditor, does not in any respect impair or abrogate the previous ancient practice, and therefore special commissions, calling for the return of an account along with the proofs, have often been issued since the passage of that Act. *Rutland vs. Yates*, 25th August, 1789. Hence, as the Court might clothe commissioners appointed to take testimony with the authority to state an account, from the proofs collected by them, so it has been held ever since the passage of the Act of 1785, that when a case is referred to the auditor by an interlocutory decree to account, or by an order directing him to state an account, or make estimates as in this instance, from the proofs in the cause, or any other proofs that may be laid before him, such a reference in itself, places him in the same situation he would have stood according to the ancient course, had a special commission been directed to him to take testimony, and also to state an account, which indeed is affirmed by the Act of 1785 itself, by its authorizing him to administer an oath to all witnesses, and persons proper to be examined upon such account. *Norwood vs. Norwood*, 2d Nov. 1801; *Barney vs. Hollins*, 4th January, 1810. Consequently, all the testimony collected and returned by the auditor in this case, has been taken, according to the long and well established course of the Court.

With regard to the taking of testimony under the authority of a special order of the Court, before a justice of the peace, I have not been able to ascertain the origin of this practice, or to trace it back to so remote a period as that of taking testimony before an accounting officer of this * Court; but I have seen it spoken of more than five and twenty years past, as a well settled practice. **419** *The State vs. Brooke*, 27th May, 1803. And the Court has gone so far as to compel a witness to submit to an examination before a justice of the peace, where it had been authorized by a special order. *Onion vs. McComas*, 1804. This mode of collecting testimony, it is believed, is peculiar to our Chancery proceedings, for I have met with no mention of any such practice in the English books. It is, however, not only in some respects the cheapest form of gathering proofs, but in many instances it greatly facilitates and expedites the progress of the cause; and the proofs are thus taken under all the principal safeguards which can in any manner insure fairness and fulness of evidence; that is, the special order of the Court, on oath, publicity, the right to cross-examine, and a final responsibility. It is upon these grounds, that I think this mode of taking testimony deserves the continued sanction, approbation, and protection of this tribunal. *Winder vs. Diffenderffer*, 4th May, 1829. The testimony taken under the order of the 21st February, 1828, before a justice of the peace, has therefore been brought in, according to the regular course of the Court.

The will of the late William Duncan it appears, has been proved and recorded, according to the Act of 1715, ch. 39, sec. 2, which declares "that it shall and may be lawful for the Judge of the probate of wills to take the probate, or cause to be proved, any last will and testament within this Province, although the same concerns titles of land," which for this purpose is still in full force. A probate so made of a will devising real estate, it has always been held, is at least *prima facie* evidence of its validity. 1 *H. & McH.* 162; 4 *H. & J.* 145; 10 *Wheat.* 465. And there being in this case no evidence which so far questions the validity of the will, as to throw the burthen of sustaining its verity upon the plaintiffs, and these infant defendants, as well as the plaintiffs, claiming under it, the * certified copy offered, must be considered sufficient for all the purposes for which it is produced. 420

From the pleadings and proofs in the cause, it is very clear that this will cannot be so construed, as to authorize a sale of the real estate, for the purpose of raising or securing the payment of this annuity; nor can it be construed to give the plaintiff, Anne Maria, an estate for life, or any other less estate, in the lands charged with the payment of the annuity. These infant devisees could only take this estate, subject to the charge upon it, and the annual rents and profits, as it is now shown, so far exceed the annuity in amount, as to demonstrate, that it is much to their benefit so to take it, and consequently all their property, in respect of this large amount of assets thus placed in their hands, is liable for the payment of this annuity. For the arrears which accrued since the death of the testator, and were left unpaid by their late guardian, Deborah Duncan, her sureties, if she gave any, or her legal representatives, may be held responsible to these infant defendants. But their estate is liable to these plaintiffs, to whom the sureties or legal representatives of the late Deborah Duncan are in no way responsible; and the present guardian of these infant defendants, Joseph Robinson, not having answered, and having thereby tacitly admitted that he had received a sufficiency of rents and profits from his ward's estate, must be held absolutely liable for the whole amount of the annuity which accrued, and has been left unpaid during the time of his guardianship. For the purpose of having a statement made upon these principles, the case was again sent to the auditor, who as directed, reported the statements on the 13th inst.

Whereupon it is on this 17th day of August, 1829, by THEODORICK BLAND, Chancellor, and by the authority of this Court, adjudged, ordered and decreed, that the bill of complaint be taken *pro confesso*, against the defendant, Joseph Robinson, and that the infant defendants, or the said Robinson, as their guardian, out of the estate and property of said wards, now in his hands, or which may hereafter come into * his hands, pay to the said plaintiffs, or bring into this Court to be paid to them, the sum of \$354.16, with inte- 421

rest on \$255, part thereof, &c. And it is further adjudged, &c. that the said Robinson pay to the said plaintiffs, or bring into this Court to be paid them, the sum of, &c. together with the costs of this suit, &c. the same to be paid by the said Robinson out of the assets of his said wards in his hands, if any there be; if not, out of his own proper estate and effects. And as against the defendant Iglehart, the bill was dismissed, with costs.

From this decree the defendants, Robinson and the two Duncans appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Mayer and Pinkney, for the appellants, contended, 1. That the devise in the will of Duncan, created a rent charge; and that the complainants had a complete remedy at law. 1 *Madd. Ch. Pr.* 78; 1 *Eq. Cases Abr.* 32; *Green vs. Winter*, 1 *Johns. Ch. Cas.* 80; *Phillips vs. Thompson*, *Ib.* 144; *Benson vs. Baldwin*, 1 *Atk.* 598. 2. That there is no evidence in the cause to charge the appellant. The infant defendants were not in default, and as their answers denied any knowledge of the statements of the bill, the latter should have been supported by proof, taken in the usual way under a commission. Evidence taken under a reference to the auditor is not sufficient. The Act of 1785, ch. 72, sec. 17, defines the powers of the auditor, and the Chancellor cannot enlarge them; that Act merely empowers the auditor to ascertain the extent of a liability, and not its actual existence. 3. The relief granted by the decree is inconsistent with the relief sought by the bill. They admitted that the Chancellor might decree a different relief from that which the bill asked for, provided the statements and charges of the bill would justify it, but not otherwise. But in this case, there is no allegation, that the infants or * their guardian received the rents and profits, and therefore the decree against them *in personam* is erroneous. 422 *Coop. Eq. Plea.* 14, (*margin.*) 4. The representative of Deborah Duncan should have been made a party to the bill. 2 *Brig. Dig.* 519; 1 *Ib.* 509; *Pla.* 243.

Speed, for the appellees, cited *Underhill vs. Van Courtland*, 2 *Johns. Ch.* 369; *Graham vs. Yates & Myers*, 6 *H. & J.* 229; *Drury vs. Conner*, *Ib.* 288; *Conner vs. Drury*, 2 *H. & G.* 221.

BUCHANAN, C. J. delivered the opinion of the Court. The bill alleging the annuity bequeathed to the complainant, Anne Maria Townshend, by her father, William Duncan, to be a rent charge upon the land devised by the same ancestor, to his two other children, William Joseph Bend Duncan and Caroline Duncan, both infants of tender years, seeks a sale of the land so supposed to be charged for the payment of the arrearages of the annuity stated to be due, and an investment of the surplus proceeds of sale, to meet

the accruing annuity as it shall become due. Deborah Duncan, now dead, the widow of William Duncan the testator, administered on his estate, and was the guardian of the infant devisees, and on her death, Joseph Robinson was * appointed guardian to the children. The bill as amended, is against the two infant devisees, and Joseph Robinson their guardian, and John Iglehart, the administrator of the administrator *d. b. n.* of the testator; William Duncan. Robinson, Iglehart, neither of them answered the bill, and the infant defendants in their answer, neither deny nor admit any of its contents, but say they know nothing of them, and put the complainants to proof, &c. It appears from the proof taken by the auditor, that from the time of the death of the testator, Deborah Duncan, who was the guardian of the children, received the rents and profits until her death, and that from the time of her death, they have been received by Robinson, the present guardian.

The Chancellor in his decree, has taken the bill *pro confesso*, as against Robinson, and dismissed it as against Iglehart, and directed that the infant defendants, or Robinson their guardian, shall pay to the complainants out of the estate of his wards, or bring into Chancery, to be paid to them, the amount of the annuity accruing during the life of Deborah Duncan, their former guardian, and stated by the auditor to remain unpaid, with interest, and that Robinson shall pay to the complainants, out of the property of his wards in his hands, if there be any, or if not, out of his own estate, or bring into the Court of Chancery to be paid to them, the amount of the annuity accruing since the death of Deborah Duncan, and stated by the auditor to remain unpaid, with interest and costs of suit. Which decree, independent of the objection urged, that it is not consistent with the relief sought by the bill, but of a different character, that being for a sale of the land on the ground that the annuity was a charge upon the land, cannot we think be sustained.

If we have taken a correct view of the subject, it was passed upon the evidence taken by the auditor, and not upon the case made by the bill. The bill contains no allegation or suggestion, of the receipt of the rents and profits by the infant defendants, or either of their guardians, or of the annual value of * the land, or of the application of the rents and profits of any part of them, for the benefit of the infants, by either of their guardians. Nor is either of the defendants called upon to make any answer or disclosure in relation to the annual value of the land, or to the receipt, or amount, or application of the rents and profits: there is therefore no issue, to which the proof in relation to the receipt of the rents and profits, and to the annual value of the land upon which the annuity claimed is alleged to be a charge, is applicable, and consequently none to support the decree, however correct it might have been, if there was such an issue in the case. The neglect of the defendant Robinson, to answer, amounts to an admission only of

the allegations in the bill, and nothing more; and the answer of the infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged in the bill and entitles them only to a decree on the case made in the bill, when proved. If it was necessary to prove the receipt of the rents and profits, and the amount, by the infant defendants, or their guardians respectively, or the annual value of the land, to entitle the complainants to the relief decreed, it was equally necessary to aver in the bill such receipt, or annual value, to make a case in the pleadings for such a decree.

The annuity bequeathed to Anne Maria, one of the complainants, is not a rent charged; it is directed to be paid out of the profits of the real estate, and there is no right or power of distress given; and there is no proof in the cause that any portion of the rents and profits was ever applied by either of the guardians, to the benefit of the infant defendants: nor does it appear that any personal property belonging to them ever came to the hands of the defendant, Robinson, or that they have any. Deborah Duncan, the former guardian, may have applied the whole of the rents and profits received by her, (except so much as was applied to the discharge of the annuity,) to her own purposes, to the prejudice of the infant **425** defendants; * and the defendant, Robinson, may have done the same, and they are by the decree, subjected to the discharge of the whole of the annuity, accruing from the death of the testator, and remaining unpaid, to be paid by them or by the defendant, Robinson, out of their estate, which is not directed to be sold. So far as the decree is against Robinson, and he is directed to pay the money out of the estate of the infant defendants, if he has in his hands no personal property belonging to them, and none should come into his hands, the decree cannot be complied with, as he is not authorized to sell the real estate. And as to that amount of the annuity which has accrued since the death of Deborah Duncan, and remains unpaid, we think that the defendant, Robinson, should not be made to pay it out of the property of the infant defendants, but his own, if he has appropriated no part of the rents and profits received by him for their benefit, but applied the whole to his own purposes, which for any thing appearing in the record, may have been done.

We do not mean to say, that the complainants would not be entitled to relief on a proper case made against the proper parties, and supported by appropriate proof. All we do say is, that in our opinion, this is not such a case, and that the decree must be reversed, with costs in both Courts.

Decree reversed.

JOHN ROBERTS *et al.* vs. SALISBURY *et al.*—December, 1831.

An implied lien for the purchase money of land where the vendor has parted with the legal title, will not be enforced against a subsequent purchaser, without notice.

* The vendor of land who parted with the legal title, and took a mortgage of the same land from his vendee, which he neglected to 426 record in due time, cannot enforce his mortgage against a subsequent purchaser from the vendee, without notice. (a)

An answer flatly denying an allegation in a bill, can only be overruled by the positive testimony of two witnesses, or of one aided by pregnant circumstances—such circumstances standing alone, without the aid of positive testimony, will not destroy the effect of an answer. (b)

Upon a bill to record a mortgage against subsequent purchasers charged with notice, the Chancellor, when the case stood ready for hearing, said in his remarks preparatory to the order appealed from, "I am satisfied that the defendants must be considered as purchasers with full notice of the vendor's (the complainant's) lien, and of the mortgage which had been given to secure the payment of the purchase money, and that under the one or the other the land was bound," but passed no order directing the mortgage to be recorded. The order passed in the cause, only referred the case to the auditor, with the usual directions to receive further proof, and state an account. *Held*, that nothing had been done conclusive upon either the Chancellor or the parties—no question of right had been settled, and that an appeal would not lie at that stage of the cause. (c)

APPEAL from the Court of Chancery. On the 1st February, 1814, the appellees, James Salisbury and others, the heirs and representatives of one Andrew Black, filed their bill against John Roberts, Isaac G. Roberts, and John Gooding, the appellants, alleging that the said Andrew Black, and one Thomas Black, both deceased, were in their life-time seized and possessed as tenants in common of a certain tract of land in Cecil County. That being so seized, the said Andrew, on the 8th October, 1808, sold and conveyed his interest in said tract to John Roberts, as will appear by a copy of the deed, exhibited with the bill; and that Roberts, for the purpose of securing to the vendor the payment of the purchase money, duly executed and acknowledged a deed of mortgage of the same land to him, on the same day, as by reference to a copy thereof exhibited, will be

(a) Approved in *Dance vs. Dance*, 56 Md. 437. See *White vs. Casanave*, 1 H. & J. 66; *Ringgold vs. Bryan*, 3 Md. Ch. 488.

(b) Approved in *Beatty vs. Davis*, 9 Gill, 218; *Glenn vs. Grover*, 3 Md. 229; *Ing vs. Brown*, 3 Md. Ch. 524; *Carpenter vs. Ins. Co.* 4 Howard, 218. See *Pennington vs. Gittings*, 2 G. & J. 122; *Rev. Code*, Art. 65, sec. 37; *Equity Rules*, R. 27.

(c) Affirmed in *Philips vs. Pearson*, 27 Md. 254; *Wilhelm vs. Caylor*, 32 Md. 162. See *Snowden vs. Dorsey*, 6 H. & J. 94; *Hagthorp vs. Hook*, 1 G. & J. 129.

seen. That soon after the execution of the mortgage, the said Black died, and that a contest arose, and continued for a considerable space of time, as to the right to administration on his estate, by reason * whereof, the time limited by law for the recording of
427 said mortgage was suffered to pass by without its being done. That suits were instituted against the purchaser on the bonds which he had given for the purchase money, upon which judgments were rendered at April Term, 1812. That after the suits were brought, and shortly before the judgments were rendered, the said Roberts conveyed all his interest in the said lands to his brother Isaac G. Roberts, of the City of Baltimore, which conveyance the complainants charge to have been made without a valuable consideration, and to prevent the said land from being taken in satisfaction of said judgments; the said Isaac G. Roberts being at the time beyond sea. That John and Isaac G. Roberts have since united in a deed of the same lands to John Gooding, the other appellant, and the complainants allege, and believe, that the said Isaac G. Roberts and John Gooding, at the respective periods, when the deeds were executed to them, well knew that a mortgage had been given by said John Roberts, of the same land, to Andrew Black, and that the purchase money therefor had not been paid; and they further charge, that no valuable consideration passed from Gooding to the grantors. The bill then alleges, that but a small part of the purchase money had been paid to Black. Prayer: That the mortgage may be directed to be recorded, to have the same effect as if it had been enrolled within the time required by law; and that the deeds from John to Isaac G. Roberts, and from John and Isaac G. Roberts to John Gooding, be declared null and void; and for general relief.

The answer of John Roberts, after alleging that he had made to Black sundry payments on account of said land, asserted, that in the years 1808, 1809 and 1810, he became largely indebted to John Gooding, and respondent's brother Isaac G. Roberts, for merchandise, and responsibilities, which they had from time to time furnished and assumed for him. That his debt to Gooding was upwards of \$4,000, and to Isaac G. Roberts, exceeding \$2,000, and * that the debt
428 to Gooding was guaranteed by his brother; he the respondent having promised to indemnify him for his advances and engagement to Gooding. That in fulfilment of this promise, on the 24th March, 1812, during his brother's absence from the United States, he conveyed to him the land, which respondent had purchased from Black, and not for the purpose of evading the payment of the judgments, which complainants were about to get. The answer denies that Gooding and Isaac G. Roberts had at that time any knowledge, so far as he is informed, of his, the respondent's, having executed a mortgage of said lands to Black; on the contrary he charges it as matter of belief that they had no knowledge whatever on the subject, until sometime after the execution of his deed to

Isaac G. Roberts, and the joint deed from Isaac G. Roberts and himself to Gooding.

The answer of Isaac G. Roberts stated, that upon the promise of his brother John to indemnify him, he consented to become his (John's) security, to various merchants in Baltimore, with whom he had dealings to a considerable amount; and also guaranteed John Gooding for any credit he might procure for said John Roberts. That in this way the said John became indebted to him in a sum exceeding \$2,000, and placed him under a responsibility to Gooding for upwards of \$4,000. That whilst the defendant was on a voyage to Europe, in 1812, the said John, in compliance with frequent promises to that effect, conveyed to him the land which he John had purchased of Black, and he positively denies any knowledge before, or at the time of the execution of said deed, and for a considerable time afterwards, of any claim by way of mortgage, or lien of any kind outstanding, or in execution. And knowing that said conveyance was made principally for the use and benefit of Gooding, he proposed to him, that if he would release this defendant from his aforesaid liability, he would convey the said land to him, and upon Gooding consenting to do so, he and his brother John united in a deed bearing date * 5th June, 1812, by which the whole interest in the said land was conveyed to Gooding. The defend- **429**
ant then avers, that the first knowledge he ever had of the mortgage to Black, was derived from Gooding, a considerable time after the date of the last mentioned deed, when Gooding had gone to Cecil County for the purpose of forbidding a sale of the land, which it was understood the representatives of Black were endeavoring to make.

The answer of Gooding, after stating the amount of his advances and liabilities for John Roberts, (in which it corresponds with the other answers,) and also the responsibility of Isaac G. Roberts over to him, proceeds to say, that it was not until some time after the execution of the deed of John and Isaac G. Roberts to him, that he had any knowledge whatsoever, that the mortgage to Black had been executed by John Roberts, or doubted but that the said John had an unquestionable, legal, and equitable title to said land. The defendant denies, that at any time prior to the date of the deed to him, he had any notice from Andrew Black, the representatives of Andrew Black, or any person on their behalf, that they had any legal title, or equitable claim, or lien on said tract of land; nor did he know that his title to the same would be contested by those representatives, until long subsequently, when an attempt was made by them to sell it under their judgment against John Roberts.

A commission issued by consent to take proof.

Nathan Baynard, a witness examined on the part of the complainants, proved, that subsequently to the 5th June, 1812, and when he was in pursuit of the sheriff, for the purpose of having the lands in the proceedings mentioned, located, in order to sell them in satisfac-

tion of the judgments against John Roberts, he (the witness being the plaintiff's agent) met with John Gooding, with whom he had a conversation to the following effect. "The witness mentioned the subject of the *feri facias* to said Gooding, who insisted he had a right to secure the money due him * from Roberts. The de-
430 ponent then observed, it would be a great hardship for the heirs to lose the purchase money of this land; inasmuch as he, Gooding, had not trusted John Roberts on the faith of it. Deponent also mentioned, that he had then in his possession that which would secure the money if he failed with the *feri facias*. Gooding asked what it was, and this deponent told him it was a mortgage deed, to which Gooding replied, it was of no value, he did not care for it, and had the opinion of the best counsel in the State that it was good for nothing. After some further conversation, deponent asked him if he had not a knowledge of the mortgage deed. He did not immediately give a direct answer, and deponent then inquired of him again, if he did not know of the existence of the mortgage deed. Gooding answered that he did." It was also proved that Gooding was the uncle of John and Isaac G. Roberts, and that from the year 1808 to 1812, the mortgage from John Roberts to Black was a good deal talked of in the county in which the land lies, and at the house of John Roberts, where Isaac G. Roberts, within the aforesaid period, was frequently seen.

BLAND, C. on the 23d November, 1829. This case standing ready for hearing, and having been by the agreement filed on the 20th inst. submitted without argument, the proceedings were read and considered.

It appears that the late Andrew Black and Thomas Black, being seized in fee, as tenants in common of a certain tract of land, Andrew Black sold and conveyed his undivided interest in it to the defendant, John Roberts, and on the same day took from him a mortgage of it, to secure the payment of the purchase money, which mortgage deed has not been recorded according to law, nor has the whole amount of the purchase money been yet paid; after which purchase and mortgage, John Roberts conveyed the land to the other defendant, Isaac G. Roberts, and then they, John and Isaac, joined in a
431 conveyance of it to the other defendant, John * Gooding. The answers aver that Isaac G. Roberts and John Gooding had no knowledge of the mortgage at the time the conveyances were made to them, but they do not say that they did not then know that the purchase money had not been paid by John Roberts. So far as regards their denial of any knowledge of the mortgage, these answers are contradicted by the positive testimony of the witness, Nathan Baynard, who declares that John Gooding admitted that he had known of the mortgage; and from the circumstances of John and Isaac G. Roberts being brothers, and also the nephews of Gooding,

and the mortgage having been frequently spoken of in a public manner at the house of John Roberts, where Isaac G. Roberts often visited his brother, and from other particulars related by the witnesses, I am satisfied that John Gooding and Isaac G. Roberts must be considered as purchasers, with full notice of the vendor's lien, and of the mortgage which had accrued or been given to secure the payment of the purchase money; and that under the one or the other, the land was bound for the payment of the purchase money to the representatives of the late Andrew Black. But the defendant, John Roberts, avers, and the plaintiffs admit, that some part of the purchase money has been paid, and yet there is no proof of the time, or amount of any payment. The case must therefore be referred to the auditor to ascertain the amount now due to the plaintiffs for the undivided share sold by their ancestor and intestate, Andrew Black.

Whereupon it is ordered that this case be, and it is hereby referred to the auditor, with directions to state an account from the pleadings and proofs now in the cause, and such other proofs as may be laid before him; and the parties are hereby authorized to take testimony in relation to said account before the auditor as usual, or before any of the commissioners appointed by this Court, or before a justice of the peace, &c.

From this decree the defendants appealed to the Court of Appeals.

* The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ. **432**

R. B. Magruder for the appellants. 1. The answers of the defendants being uncontradicted, except by a single witness, and not directly contradicted, ought to have been held sufficient to prevent a decree against the defendants below. 2. That there were no circumstances which, when taken together with the testimony of the witnesses, ought to have discredited the answers sufficiently to authorise the decree of the Chancellor against the defendants.

No counsel argued for the appellees.

BUCHANAN, C. J., delivered the opinion of the Court. It appears that Andrew Black, having sold and conveyed to John Roberts his interest in a tract of land, took from him on the same day a mortgage of the same land to secure the payment of the purchase money, which deed of mortgage has not been recorded; that afterwards, John Roberts, the mortgagor, conveyed the same land to Isaac G. Roberts, and that subsequently, John and Isaac G. Roberts united in a conveyance of it to John Gooding. The object of the bill, in which it is stated that the purchase money of the land for which the mortgage was given has not been paid, and that Isaac G. Roberts and John Gooding, when the conveyances were respectively made to them, had a knowledge of that fact, and also of the existence of the mortgage, is, to have the mortgage deed recorded, and the deeds

from John Roberts to Isaac G. Roberts, and John Roberts and Isaac G. Roberts to John Gooding, vacated. Isaac G. Roberts and John Gooding, in their answers flatly deny any knowledge of the existence of the mortgage, when the conveyances to them were respectively made; and we think they equally deny a knowledge of the existence of a lien of any kind whatsoever. Nor can we perceive any thing in the evidence, to show that either of them had before,

433 or * at the time of the execution of the deed to Gooding, any knowledge that the purchase money, or any part of it, remained unpaid by John Roberts. An answer flatly denying an allegation in a bill, can only be overruled by the positive testimony of two witnesses, or of one, aided by pregnant circumstances, neither of which will be found to exist here, in relation to the denial by Isaac G. Roberts and John Gooding, of any knowledge of the mortgage, when the conveyances were respectively made to them. One witness, it is true, and only one, does swear that in a conversation with Gooding, he admitted that he had at that time a knowledge of the existence of the mortgage deed; but that was some time after the execution of the deed to him, and about the time at which he says in his answer he first acquired a knowledge of the mortgage, and does not carry back his knowledge of the mortgage, to the time of the conveyance to him. The testimony therefore of the witness, does not contradict, but is consistent with the answer; and if there were pregnant circumstances, which we do not wish to be understood as affirming, yet standing alone, without the aid of the positive testimony of a single witness, they would be unavailing. Nor is there the positive testimony of a witness, to show by the admissions of Isaac G. Roberts, or otherwise, that he had any knowledge of the existence of the mortgage at the time in question; we should therefore say, that in our opinion, Isaac G. Roberts and John Gooding are not to be considered and treated as purchasers with notice. But we think that the appeal has been improvidently taken; there has been no decision in Chancery settling or binding the rights of the parties.

The Chancellor has, it is true, in his remarks preparatory to the order appealed from, said, he is "satisfied that John Gooding and Isaac G. Roberts must be considered as purchasers, with full notice of the vendor's lien, and of the mortgage which had accrued or been given to secure the payment of the purchase money, and that under the one or the other, the land was bound for the payment of the purchase money to the representatives of the late Andrew Black;" but he has passed no decree directing the deed of mortgage from John Roberts to Andrew Black to be recorded, or vacating and annulling the deeds from John Roberts to Isaac G. Roberts, and from John Roberts and Isaac G. Roberts to John Gooding, or either of them; but has passed an order only, referring the case to the auditor, with directions to state an account for the

purpose of ascertaining the amount of the purchase money due to the complainants.

It is to be presumed, from the intimation given by the Chancellor of his opinion, that it was his intention at that time, to decree relief to the complainants, at the final hearing. But he had not reached that stage of the cause to which the order in question was only preparatory, and might before the final hearing, have taken a different view of the case, and decreed accordingly. Nothing had been done conclusive, upon either the Chancellor or the parties; no question of right had been settled; but upon further consideration he might, after an account taken in pursuance of the order, have rejected it and dismissed the bill, had not the proceedings been arrested by the appeal. It is not like the cases of *Thompson vs. McKim et al.* 6 H. & J. 302, and *Williamson vs. Carnan*, 1 G. & J. 184, where the rights of the parties were adjudicated upon, but cannot be distinguished in principle from *Snowden et al. vs. Dorsey et al.* 6 H. & J. 104, which has since been followed up by *Hagthorp et ux. et al. vs. Hook's Adm'r*, 1 G. & J. 270, and *Danels vs. Taggart's Adm'r*, *Ib.* 311, and *Hungerford vs. Bourne*, *ante*, 142. The appeal therefore is dismissed with costs.

Appeal dismissed.

* SOTHORON vs. GUSTAVUS and GEORGE WEEMS.—December 435
ber, 1831.

Where a party at the trial of a cause makes a general prayer to the Court, which is refused, and the Court then proceeds of their own accord to give a specific instruction to the jury, which was excepted to, this Court upon appeal will review such instruction, although since the Act of 1825 it would not have regarded the general prayer.

In an action of assumpsit brought by W. & Co. to recover a portion of the instalments mentioned in the following agreement, dated 1st Dec. 1818, viz: "We the subscribers, promise to pay unto W. & Co. the sum we may subscribe as a payment for the steamboat S. in three equal instalments, viz. &c. It is hereby understood, that we, W. & Co. bind ourselves to appropriate the money subscribed in no other manner, but for the payment and use of said boat, and that each subscriber will hold an interest in proportion to the shares he may take. We, W. & Co. bind ourselves to run said boat from B. &c. and use every possible exertion in our power to the interest of the said boat. The shares will be divided into 280, of \$100 each." It appeared that 51 shares of the stock had been subscribed for, of which the defendants had taken five. *Held*, 1. That it was not to be implied from the terms of this agreement, that W. & Co. were the owners of the steamboat. 2. That the signing of this contract was an imperfect act, of no legal obligation until the whole number of shares should be subscribed; and until that was done W. & Co. were under no obligation to perform their part of the agreement. 3. That W. & Co. having assigned, by way of mortgage, three-fifths of the said steamboat, after the signing of the agreement and before the bringing of the action, the consideration for the promise of paying the instalments contained in

the agreement had failed, and therefore the action could not be sustained. 4. That upon the issue joined in this case, the defendant could not show that at a meeting called by W. & Co. of the subscribers thereto, it was determined by them not to pay the subscriptions, upon the ground that W. & Co. had failed in their part of the engagement.

Evidence offered to the jury for a particular purpose, may be properly rejected, though it might be admissible for some other object in the same cause. (a)

Under the Act of 1825, ch. 117, the Appellate Court considers what particular point, or question the County Court has decided, and determines accordingly, whether it is correct or erroneous, and not whether the reasons assigned by the counsel on the record justifies what has been done.

So where the admissibility of the testimony adduced, being objected to, whether it was admissible or not for the reason assigned, is wholly immaterial; this Court regards as the point decided below, the competency or incompetency of the evidence. (b)

436 * APPEAL from Saint Mary's County Court. Assumpsit by the appellees for the use of Gustavus Weems, commenced against the appellant, James F. Sothoron, on the 20th of November, 1821. The defendant pleaded *non assumpsit*, to which issue was taken. (See *Weems et al. vs. Millard*, 2 H. & G. 143.)

At the trial the plaintiffs read to the jury the following paper: "We the subscribers promise and oblige ourselves, our heirs and executors, to pay or cause to be paid unto George Weems & Co. the sum we may subscribe as a payment for the steamboat *Surprize*, in three equal instalments, in manner and form following, viz: one-third on or before the 10th day of March next, one-third on or before the 10th day of April following, and the balance on or before the 10th day of June next. It is hereby understood, that we, George Weems & Co. bind ourselves to appropriate the money subscribed in no other manner but for the payment and use of said boat, and that each subscriber will hold an interest in proportion to the shares they may take, and will be entitled to draw their proportion of dividend once in every six months after the starting of the said boat. We, George Weems & Co. bind ourselves to run said boat from Baltimore to Patuxent River, and as far up as Nottingham, and to use every possible exertion in our power to the interest of the said boat. The shares will be divided into 280 shares, of \$100 each. 1st December, 1818." Then follows the list of subscribers, annexed to the above paper, to the amount in the whole of fifty-one shares. The defendant's name

(a) Affirmed in *Basford vs. Mills*, 6 Md. 393; *Warner vs. Hardy*, 6 Md. 539; *Carroll vs. Ridgaway*, 8 Md. 335.

(b) Approved in *Parker vs. Sedwick*, 4 Gill, 322; *Middlekauff vs. Smith*, 1 Md. 338; *Ellicott vs. Peterson*, 4 Md. 485. In *Bell vs. State*, 57 Md. 108, it was held that the reasons given for the Court's ruling and an intimation of what its ruling would be on the offer of certain evidence, form no part of the ruling and cannot be made the subject of exception.

was down for five shares, and his signature thereto was admitted; the partnership of the plaintiffs was also admitted, and thereupon the plaintiffs closed their case.

The defendant then prayed the Court to instruct the jury, that the plaintiffs were not entitled to recover; but the Court, [STEPHEN, C. J.] refused the instruction prayed for, and directed the jury that the contract or subscription list bore on its face evidence, that Gustavus and George Weems, the plaintiffs, were the proprietors and owners of the steamboat * Surprise, at the time when the said list or contract was signed, and that the said list proved the aver- **437**
ment of ownership in the declaration, and that the plaintiffs were entitled to recover. The defendant excepted.

2. In addition to the evidence contained in the first bill of exceptions, the defendant offered to read in evidence to the jury, a certified copy of a deed of mortgage executed by George Weems, one of the plaintiffs, to John White, cashier of the Branch Bank of the United States at Baltimore, dated on the 18th of August, 1820, and duly acknowledged and recorded, of three undivided fifth parts of the steamboat Surprise, with the like proportion of her tackle, apparel, &c. to secure to the said Branch Bank the sum of \$7,600, due to it by the plaintiffs, Gustavus and George Weems, upon their joint promissory note, dated June 30th, 1820. To the admissibility of this evidence the plaintiffs objected, and the Court sustained the objection. The defendant excepted.

3. After the evidence in the preceding exceptions had been given, or offered and rejected, the defendant, for the purpose of showing that George Weems, one of the plaintiffs, had been finally discharged under the insolvent laws of the State, offered to read in evidence a transcript of the record and proceedings in his case before the commissioners of Insolvent Debtors, and County Court of Baltimore County; to the admissibility of which, under the general issue, the plaintiffs objected. The Court sustained the objection, and excluded the testimony. The defendant excepted.

4. The defendant then offered to prove by a competent witness, that George Weems, one of the plaintiffs, advertised for a meeting of the stockholders in the steamboat Surprise, at Leonard-Town, and the meeting was had some time in the summer. When they met, the said Weems asked for payment of their subscriptions from the present defendant, and others present; the stockholders refused to pay, alleging that he had not complied with his part of the contract, by putting the steamboat Surprise in a proper state to navigate, as agreed, and the present defendant, with all the stockholders present, then agreed they would not pay their subscriptions. To the admissibility of this testimony the plaintiffs objected, upon the ground that a subsequent agreement by parol, could not be admitted to contradict or vary a written contract. The objection was sustained by the Court, and the evidence withheld from the jury. The

defendant excepted, and the verdict and judgment being for the plaintiffs, he brought the present appeal.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

439 *Magruder, Scott, and Stonestreet*, for the appellant, * referred to 2 *Saund. Pl. and Ev.* 136; 2 *Ib.* 245; *Cuff vs. Penn.* 1 *Maul. and Selw.* 21; 3 *Stark. Ev.* 1007; *Batturs vs. Sellers*, 6 *H. & J.* 249; *Wyman and Gray*, 7 *Ib.* 409; *Stewart vs. The State*, 2 *H. & G.* 114.

C. Dorsey, for the appellee, referred to *Roberts on Frauds*, 124; *New. Con.* 171.

DORSEY, J, delivered the opinion of the Court. The County Court were right in refusing the defendant's prayer, in his first bill of exceptions, it being a general prayer, the granting of which, since the Act of 1825, would be error. To this refusal no exception was taken. But the Court, however, did not stop here; they instructed the jury, "that the contract or subscription list, bore on its face evidence that Gustavus and George Weems, the plaintiffs, were the proprietors and owners of the steamboat Surprise, at the time when the said list or contract was signed, and that the said list proved the averment of ownership in the declaration, and that the plaintiffs were entitled to recover; to no part of which instruction can we subscribe our assent. Instead of this subscription list *per se*, importing that at its date the plaintiffs were the owners of the steamboat Surprise, as far as any inference on that subject can be drawn, from its entire context we should infer, that the Surprise was owned by some other person, and that the object of the subscription was to raise the sum of \$28,000, with which the appellees were to purchase and equip the steamboat, for the purposes set forth in the contract. If the boat were already the property of the appellees, what motive **440** could prompt the subscribers to require the appellees * to bind themselves "to appropriate the money subscribed in no other manner but for the payment and use of said boat." The appellees being the owners, it was perfectly immaterial to the subscribers, what appropriation might be made of so much of the fund raised by subscription, as covered the price of the boat; and it were absurd in the appellees, the owners of the boat, who received the money in payment for her, to stipulate that they would appropriate the money in no other manner but for the payment of the boat; besides, if George Weems & Co. had been the owners of the Surprise, can a reason be assigned, why the price to have been paid for her was not inserted in the contract? Was it a matter to have been left to the uncontrolled discretion of the sellers, in which the subscribers, the purchasers, had no interest, and of which they desired no information? The nature of the transaction repudiates such ideas. But conceding that

the County Court were correct in inferring from the subscription list, that George Weems & Co. were the proprietors of the steamboat, we cannot assent to that part of their instruction, which declares that they are entitled to recover. The signing of the contract was an imperfect act, of no legal obligation until the 280 shares should be taken. Until then, George Weems & Co. had they subscribed the agreement, as from its tenor, it was manifestly designed they should do, could not have been compelled to perform any of the stipulations on their part assumed: nor could they have exacted performance of any of the subscribers, because the implied condition (the subscription of the 280 shares,) on which their liability was to become absolute, had not occurred.

To test the accuracy of the County Court's opinion, in the second bill of exceptions, let it be admitted, that their instruction, as given in the first bill of exceptions, stands free from all objection, and that according to the proof then offered, the plaintiffs below were entitled to recover; does not the copy of the conveyance offered in evidence in the second exception, divest them of the basis of their action?

* Upon the assumption of the Court's correctness in the preceding exception, what is the consideration on which depends, **441** the right to coerce the subscribers to a performance of their engagements? It is, that on payment of their money, they thereby acquire as an equivalent, an interest or property in the steamboat *Surprize*. If then it be shewn, that the payment of the subscription will not invest the subscribers, with the stipulated property in the steamboat, the consideration for their promise has failed, and payment cannot be enforced in a Court of justice. The testimony offered, we think, fully establishes such failure of consideration; and the County Court therefore erred in its rejection.

The withholding from the jury the evidence set forth in the third bill of exceptions, gives to the appellant no ground for complaint; it was offered for a particular purpose, and if inadmissible therefor, it was properly rejected, although it might be admissible for other purposes. The object of the testimony was stated to be, "for the purpose of proving that he (George Weems) had been finally discharged under the insolvent laws of the State." This fact being immaterial to the issue in the cause, the proof for its establishment could not be otherwise, than incompetent. Had it been offered not only for the purpose stated, but to prove, that all the property, rights and credits of George Weems, had passed out of him, and vested in his trustee, it might perhaps have presented a different question for consideration.

The decision of the County Court in the fourth bill of exceptions, meets our approbation. The admissibility of the testimony adduced, being objected to, whether it be inadmissible or not, for the reason assigned, is wholly immaterial. If it be inadmissible on any ground, it should be rejected; and when the subject comes in review before

this Court, under the Act of 1825, we regard, as the point decided by the Court below, the competency or incompetency of the evidence, not the sufficiency or insufficiency * of the reason urged for its
442 rejection. Upon the issue joined on the pleadings in the cause, the testimony in this exception was clearly incompetent.

We concur with the County Court, in their decisions in the third and fourth bills of exceptions, but dissent from their opinions in the first and second, and therefore reverse the judgment.

Judgment reversed.

STATE, use of WILSON *et ux.* *vs.* JAMESON.—December, 1831.

In an action by S. a distributee of W. against L. his administrator, upon the administration bond, to recover a distributive share of W's estate, it appeared, that W. on the 22nd October, 1810, conveyed sundry tracts of land and negroes to F. in consideration of \$1,000, paid by F; and that F. by a deed dated a few days after, and reciting the previous deed, and declaring that it was in trust, conveyed the same property to R. in trust for W. for life, then in trust for the wife of W. if she should survive him, for life, or during her widowhood, then in trust for E., A., M., S., and T. daughters of W. as to one moiety of the land for life, and as to the other moiety for B. son of W. and upon the death or marriage of the daughters, then to B. in fee. The negroes were also distributed among the same parties. L. the administrator, was another son. The trust estate was not brought into hotch-pot. *Held*, that these deeds were to be considered as one instrument, and afford ample proof, that S. was advanced by the intestate in his life-time. No valuable consideration moved from S. and as respects her, the deeds were voluntary and gratuitous; but that this was no bar at law, to this action. (a)

It is not every child that is advanced, the law excludes from distribution. It is only such as are advanced by a portion, equal or superior to a share. To make a full defence at law, under the Act of 1798, ch. 101, sub-ch. 11, sec. 6, the defendant must show to the jury, the value of the plaintiff's advanced portion, and that it was equal to his distributive share.

(b)

APPEAL from Charles County Court. The present was an action of debt, instituted on the 5th August, 1825, in the name of the State

(a) Cited in *Hayden vs. Burch*, 9 Gill, 82, where the Court said that *Wilson vs. Jameson*, "was an action in the County Court by the distributees upon the bond of the administrator, in which it was attempted to set-off an advancement by the intestate in his life-time by a gift of real estate. Although it is intimated there that in a proper form of pleading it might be used in that Court as a bar to the action, yet it is announced decidedly by the Court. that the proper *forum* for relief in all such cases, is in a Court of Chancery. where the respective rights of all may be adjusted agreeable to the rules of equity." See also *Young's Estate*, 3 Md. Ch. 465.

(b) Cited in *Young's Estate*, 3 Md. Ch. 464. Cf. *Graves vs. Spedden*, 46 Md. 533.

of Maryland, at the instance, and for the use of William M. B. Wilson, and * Sarah Q. his wife, against the appellee, Luke F. Jameson, on his bond, as administrator of Walter Jameson, **443** deceased, to recover the distributive share, of the said Sarah Q. as one of the children and representatives of the said Walter, of whom there were nine.

1. At the trial it was admitted that the plaintiff, Sarah Q. and the defendant, are each representatives of the deceased Walter Jameson. The plaintiff then read in evidence, the inventory of said deceased's estate, returned by the defendant to the Orphans' Court, on the 14th December, 1814, amounting to the sum of \$3,524.89. Whereupon the defendant offered in evidence to the jury, a deed from Walter Jameson, the deceased, to one John E. Ford, bearing date on the 22d October, 1810, and recorded on the 31st October, of the same year; by which, for and in consideration of the sum of \$1,000, to him in hand paid by the said Ford, the said Jameson conveyed to the said Ford, his heirs, and assigns, sundry tracts of land, and negro slaves. And also read to the jury, the following deed from the said Ford, to one Raphael Jameson, bearing date 31st October, 1810, viz: "Whereas Walter Jameson, by deed bearing date on or about the 22nd day of this month, did convey and transfer unto the said John E. Ford, all the real and personal property hereinafter designated, as by referring thereto will more fully and at large appear; In trust that the said John E. Ford should assure and convey the said real and personal property in the manner hereinafter expressed. Now this indenture witnesseth, that the said John E. Ford, in compliance with the confidence placed in him, by the said Walter Jameson, and for the consideration of the sum of \$1,000, to him in hand paid by the said Raphael, hath granted, bargained, and sold, and by these presents, he the said John E. Ford doth grant, bargain, and sell, unto the said Raphael Jameson, his heirs and assigns, all the following tracts, and negroes, (being the same lands and negroes contained in the before mentioned deed from Walter Jameson to the said Ford.) To have and to hold the same unto him the said * Raphael, **444** his heirs and assigns, upon trust, nevertheless, and for the following uses and benefits; that is to say, upon trust, that the said Raphael Jameson and his heirs, shall permit, and suffer the said Walter Jameson, to have the use, profits and emblements, of all the said real and personal estate, for and during the term of his natural life, without impeachment of, or for any manner of waste, and without liability to, or for any debts contracted, or to be contracted, by the said Walter Jameson, after the day and year aforesaid, and from and after the death of the said Walter Jameson, in case Teresa Jameson, wife of the said Walter Jameson, survives him, then in trust, that the said Raphael Jameson, and his heirs, shall permit and suffer the said Teresa Jameson to have and receive the profits, &c. of the said real and personal estate, (except such issue, as may be

horn of the female slaves,) for and during the term of her single life or widowhood, in bar of her dower, or thirds in the real and personal estate of the said Walter Jameson. And from and after the death or marriage of the said Teresa Jameson, in trust, as to the real estate aforesaid, that the said Raphael Jameson and his heirs, shall permit Elizabeth Jameson, Alice Jameson, Marriamne Jameson, Teresa Jameson, and Sarah Jameson, (daughters of the said Walter Jameson,) or such of them as shall lead a virtuous, and chaste life, severally to have, and receive one moiety of the land heretofore described as the land on which the said Walter Jameson now resides; and also one moiety of the lands called McCatees, as aforesaid, which said moiety shall include the dwelling house of the said Jameson; and to permit Benjamin Jameson, son of the said Walter, to have and receive the use, &c. of the other moieties of the lands last aforesaid; and from and after the marriage or death of the said daughters, then in trust, that the said Raphael Jameson, and his heirs, shall convey by a good and sufficient deed, all the lands last aforesaid, to the said Benjamin Jameson, his heirs and assigns forever.

445 Jameson, his executors or administrators, shall deliver to the said Benjamin Jameson a certain negro boy, to another son, a second negro boy; and to a third son, a third negro boy. And to divide all the rest, and residue of the said negroes, with the increase, equally between the said daughters, Elizabeth, Alice, Marriamne, and Sarah Jameson." It was admitted that the plaintiffs, Wilson and his wife, (who is the above named Sarah,) did not bring into hotch-pot, the property received by them, in virtue of the deed to instruct the jury, son. The defendants then prayed the Court to recover; that under the evidence, the plaintiffs were not entitled to recover; which instruction the Court gave. The plaintiffs excepted, and the verdict and judgment being for the defendant, they appealed to this Court.

When the cause came on to be argued in the Court of Appeals, it was agreed so to amend the record, "that the Court should review the opinion below, upon the point, whether the deeds and evidence in the bill of exceptions, constitute an advancement in law, so as to preclude a recovery by the plaintiffs of a distributive share of the estate of Walter Jameson, the father, without bringing the same into hotch-pot."

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Browner, for the appellants, referred to *Edwards vs. Freeman*, 2 P. Wms. 436; *Stewart vs. The State*, 2 H. & G. 114.

446 C. Dorsey and Stonestreet, for the appellees, A settlement of a child in the life-time of the father is an advancement. *Edwards vs. Freeman*, 2 P. Wms. 445; *Powis vs. Burdett*, Va. 435; *Burn*

Ecl. Law, 710. The second deed shows the object of the first, and the Court was the proper tribunal to expound it. *Stewart vs. The State*, 2 H. & G. 114. The consideration of the deed from Jameson to Ford appears to have passed from Ford, and was voluntary, and gratuitous therefore, so far as concerns the children.

A. C. Magruder, in reply. The plaintiffs having made a case, entitling them to recover, should have had a verdict, unless the deeds take that right from them. The property in the deeds is not shown to have been equal to plaintiff's proportion of the intestate's estate, which should have been done, to justify the opinion of the Court, even if the deeds do constitute an advancement. Our Act of 1798, ch. 101, sub-ch. 11, sec. 6, does not make it necessary for a party to bring his advancement into hotch-pot. But the deeds do not constitute an advancement. To give them that effect, it must appear affirmatively, that such was the object of the parent. The great question in these cases always being to ascertain the intention of the parent. 4 *Kent Com.* 413. Jameson's deed shows a consideration moving from Ford to him. It was not therefore voluntary, which is essential to an advancement. *Stewart vs. The State*, 2 H. & G. 114. The inference from the deed is, that an advancement was not designed, or it would have been so expressed.

EARLE, J. delivered the opinion of the Court. The Court's opinion, excepted to in this appeal, manifestly relates to a state of pleadings, and issue joined between the * parties, that do not appear in the record. The counsel in the cause admit the defect, and to 447 save the expense and delay of a suggested diminution, have agreed that we shall review the opinion below as expressed in the bill of exceptions upon the point, whether or not the deeds and evidence constitute an advancement in law, so as to preclude a recovery by the plaintiffs of a distributive share of the estate of Walter Jameson, the father, without bringing the same into hotch-pot. It is understood too, that the generality of the prayer submitted by the defendants, is not to be noticed by us in revising and deciding on the opinion of the County Court. The case is an action instituted on the administration bond of Luke F. Jameson, administrator of Walter Jameson, father of the plaintiff, by Sarah Q. Wilson, to recover a distributive share of his personal estate, in nine parts to be divided, which from the inventory offered in evidence, appears in amount to be \$3,524.89. The defendant read in evidence the deed from Walter Jameson to John E. Ford, dated the 22d October, 1810, and the deed from John E. Ford to Raphael Jameson, bearing date the 31st October, 1810; and the plaintiffs having admitted they did not bring into hotch-pot the property received by them under the deed from John E. Ford to Raphael Jameson, the Court instructed the jury, that under the evidence, the plaintiffs were not entitled to recover.

These being all the facts laid before the Court and jury, we presume their honors thought that the daughter had been advanced by her father in his life-time, and that she and her husband could not sustain their suit without bringing the advanced property into the reckoning with the shares of her brothers and sisters.

Upon the question of advancement, we entirely agree with the County Court. The deeds offered in evidence are conveyances in trust by the father for the benefit of his daughter Sarah and others, and afford ample proofs that she was advanced by the intestate in his life-time. We consider them as one instrument, and conveying

448 estates in * trust; they are wholly unlike the bill of sale in the case of *Stewart vs. The State, use of Rigger and Wife*. That appeared to be an absolute transfer for a valuable consideration of the property mentioned in it; and on a case stated, which was viewed as a special verdict, the Court very properly refused to make inferences, to give a character to the deed different from what it purported to be on the face of it. But there is no need to go out of these deeds, or to have recourse to extraneous matter to arrive at their true intention. No valuable consideration moves from the daughter Sarah, and so far as respects her, the conveyances are obviously voluntary and gratuitous. No account is given in the record of the wife of Walter Jameson, but it would seem from the admissions of the plaintiffs, that her title to the negroes had ceased by her death or marriage. If she had at the trial been living and unmarried, we should nevertheless have been of opinion, that the plaintiff, Sarah, had been advanced by the settlement, or portion secured to her by the deeds. Her interest in the negroes in remainder is a vested interest, and susceptible of valuation; and in the case of *Edwards and Freeman, 2 Pier. Wms. 442*, the Master of the Rolls says, that a reversion settled on a child, as it may be valued, is an advancement; and that a portion secured to a child, though in futuro, is a provision according to its value. In the remaining branch of the Court's opinion, upon reflection, we cannot concur. To sustain the suit, there is no legal obligation on the plaintiffs, that we can perceive, to bring their advancement into hotch-pot. In the Orphans' Court, the administrator may not have given them an opportunity to bring it into reckoning, and on a trial at law, we do not see well how they could do so. On the other hand, the defendant's evidence, that the plaintiff's wife was advanced by her father in his life-time, only goes to establish that fact, and is not of itself sufficient to entitle him to a verdict. It is not every child that is advanced, by a portion from the distribution. It is only such as are advanced, by a full and per-
449 fect defence, it appears to us to have been incumbent on the defendant to have gone a step further, and showed by testimony the value of the portion; and to have satisfied the jury, in the words of the Act of 1798, ch. 101, sub-ch. 11, sec. 6, that it was equal or supe-

rior to a child's share in the intestate's estate. This would have excluded the plaintiffs from participating in the father's personal property, and nothing short of this, it seems to us, could have defeated their action. Our judgment on this subject is formed on the case before us, and is to be understood to apply only to a trial in an action at law. In what way we should have viewed the same point had this been a proceeding in a Court of equity for a distributive share, we are at present not prepared to say. It might have required a strict examination of the British authorities, and a close comparison of our Act of Assembly, with the Statute of Distributions, the Statute of 22 and 23 of Chas. 2, ch. 10, which in this case we have not made.

We however decidedly think, that where more than one child has been advanced, the remedy at law by a suit on the administration bond, is by no means an adequate one. The settlement on the plaintiff in the action can alone be inquired into, and if taken into the distribution, he might be seriously prejudiced, having to divide with another, the amount of whose advancement ought to exclude him from sharing in the surplus. In such cases more perfect relief might be had in a Court of Chancery, where all the parties in interest may be brought before the Court, and their respective rights adjusted, agreeably to the rules of equity, among the most just of which is equality.

Judgment reversed, and procedendo awarded.

* JAMES BOSLEY vs. THE CHESAPEAKE INSURANCE COMPANY. 450
—December, 1831.

Where a variety of facts have been proved, a prayer making a partial enumeration of them, and thereupon asking an instruction to a jury, will not be granted, if not sustained by a consideration of all the facts proved, which belong to the question, whether enumerated or not. (a)

An insured is not compelled in any case to abandon. He has an election which rests in his discretion: but no right to claim for a technical or constructive total loss vests, until such election is made.

An election to abandon for a total loss cannot be made, until receipt of advice of the loss.

Intelligence of the loss of a ship derived from a newspaper, is sufficient advice to authorize an insured to abandon upon.

The information which is sufficient to authorize the assured, to give notice to the underwriter, that he abandons, must be of such facts and circumstances as would sustain the abandonment, if existing in point of fact, at the time the notice was given.

(a) Approved in *Adams vs. Capron*, 21 Md. 205; *Winner vs. Penniman*, 35 Md. 168; *Haines vs. Pearce*, 41 Md. 234. As to prayers upon segregated facts, see *Whiteford vs. Burckmeyer*, 1 Gill, 127; *Riggin vs. Ins. Co.*, 7 H. & J. 208.

The mere stranding of a vessel, does not of itself, form a substantive ground of abandonment. The right to abandon on such an occurrence, depends on the attending circumstances.

So where the assured addressed the following note to the underwriter: "I observe by the Boston newspaper of the 29th January, that the ship S. insured in your office, was driven ashore in a heavy gale of wind, on the 6th of December, and by a Charleston paper of the 26th of January, that on the 18th she was not got off. In so dangerous a situation as Helvoet roads, it is to be feared a total loss has ensued, I therefore as a measure of precaution both for your interest and my own, abandon to you, and claim a total loss." Held, that this letter did not state to the underwriter, a sufficient reason for the offer to abandon. A mere apprehension that a total loss may have taken place, does not authorize the offer.

To justify the reversal of a Court's judgment, on the ground of their having given an erroneous instruction to the jury, it must appear that the appellant actually, or probably, did sustain an injury thereby. If it did him no prejudice, no matter how erroneous, it forms no ground of reversal.

(b) The testimony of jurors cannot be heard to impeach their verdict, whether the conduct objected to in the jury be misbehavior or mistake. (c) Per ARCHER, J.

APPEAL from Baltimore County Court. This was an action of covenant, brought upon a policy of insurance effected by the appellant, Bosley with the appellees, The Chesapeake Insurance Company. The original writ was sued out upon the 12th of July, 1823. The plaintiffs' declaration contained three counts. The first count alleged * that on the 12th day of December, 1822, at Baltimore, &c. by a certain policy of insurance, then and there made and sealed with the seal of the Chesapeake Insurance Company aforesaid, which the said Bosley here brings into Court, &c. the Chesapeake Insurance Company did insure the said James Bosley, lost or not lost, at and from a port or ports called the General Smith, whereof was the master for that voyage, from the ports aforesaid, and so should continue and endure until the said vessel should be arrived at Baltimore aforesaid, and there moored twenty-four hours in safety. And it was by said policy declared and agreed, that it should and might be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to the said insurance; the said vessel, her tackle and appurtenances, for so much as concerned the said policy, by agreement between the assured and assurers in the said policy, was valued at the sum insured. The perils and adventures which

(b) Approved in *Keener vs. Harrod*, 2 Md. 74; *Rawlings vs. State*, 18 Md. 816; *Glenn vs. Rogers*, 3 Md. 822.
(c) Approved in *Ford vs. State*, 12 Md. 546; *Browne vs. Browne*, 22 Md. 118.

they, the assurers, took upon themselves, and were contented to bear in the said voyage, were of the seas, men of war, fire, &c. and all other such perils, losses and misfortunes as had or should come to the hurt, detriment or damage of the said vessel, or any part thereof, for which assurances are legally accountable; and in case of any loss or damage, it should be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovering of the said vessel, or any part thereof, without prejudice to the said assurance: to the charges whereof they, the assurers, should contribute, according to the amount of the sum thereby assured. And so they, the assurers, were content, and did thereby bind the Chesapeake Insurance Company to the assured, their executors, administrators and assigns, for the true performance of the * premises, confessing themselves paid the consideration for the assurance by the assured, at and after the rate **452** of two and a half per cent.; to return one per cent. if from one port: in case of loss, the same was to be paid in ninety days after proof and adjustment thereof; the amount of the note for premium, if unpaid, being first deducted, provided such loss should amount to five per cent., under which no loss or damage was to be paid on ship, unless general, &c. And the said James in fact says, that the said ship or vessel then and there being the property of the said James, and so ever after continuing to be, until and up to, and at the time of the loss hereinafter mentioned, and said James being then and continually as aforesaid interested in said ship, to the value of all sums insured thereon, was heretofore, to wit, on the 3d day of December, 1822, at a port in Europe, to wit, at the port of Rotterdam, to wit, at, &c. and then and there being the property aforesaid of the said James Bosley, and being so the property of the said Bosley at the time of making said insurance, and said policy of insurance did, to wit, on the said 3rd day of December, 1822, depart and set sail from a port in Europe as aforesaid, to wit, from the port of Rotterdam, on her said voyage in said policy mentioned, for and towards Baltimore aforesaid; and that afterwards, and whilst the said vessel was proceeding on said voyage, to wit, on the 4th day of February, 1823, to wit, in Helvoet roads, to wit, at, &c. and before the completion of the voyage aforesaid, the said vessel was by the force and violence of the winds and waves, and by the perils and dangers of the seas, forced and driven and cast upon and against certain shoals and banks, and thereby, and by drift of ice, then and there, became strained, disjointed, broke and damaged, insomuch that the said vessel thereby then and there was wholly lost to the said James, and a large sum of money, to wit, the sum of \$2,000, was then and there expended by the said James, in and about the safeguard, recovery, defence and preservation, and toward the reparation of said vessel; which said sums of money * so paid, laid out and expended, and the said sum of \$15,000, the defendants became **453**

and were liable to pay the said James according to the tenor and effect of the said policy of insurance; of all which premises the said Chesapeake Insurance Company, to wit, on the 4th day of February, 1823, had notice, to wit, at, &c.

2d Count. After referring to the same policy, it averred.—And the said James does in fact say, that the said ship or vessel was, to wit, on the 3d day of December, 1822, in good safety at a port in Europe, to wit, at the port of Rotterdam, and that afterwards, to wit, on the said 3d day of December, in the year last aforesaid, the said ship departed and set sail from the port in Europe aforesaid, to wit, from the port of Rotterdam aforesaid, for and toward Baltimore aforesaid, on her voyage in said declaration mentioned; and that whilst the said ship was proceeding on her said voyage, and before the completion thereof, and her arrival at her port of destination aforesaid, to wit, on the 4th of February, 1823, to wit, in Helvoet roads, &c. by the perils and dangers of the seas, was stranded, and wholly lost to the said James, and that large sums of money, to wit, to the amount of \$2,000, were then and there expended by said James, in and about the safeguard, defence, recovery, and preservation and reparation of said ship, which said sum of money, and the said sum of \$15,000, the defendants became and were liable to pay to the said James, according to the tenor and effect of said policy of insurance; and the said James in fact says, that at the time of making the said policy of insurance, and continually thence up to and at the time of the loss aforesaid of said ship, the said ship was his property, and that he was interested therein as valued, to the value of all the sums insured thereon as aforesaid, of all which premises the Chesapeake Insurance Company, to wit, on, &c. at, &c. had notice.

3d Count. Alleged as a breach of the covenants in the same policy—that before the completion of her said voyage, to wit, on the 4th of February, 1823, to wit, at Helvoet roads, to wit, 454 * &c. at, &c. before the arrival at her port of destination, Baltimore aforesaid, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, was bulged, broken, and damaged, and destroyed, in so much that the said vessel then and there became wholly lost to the said James, and a large sum of money, to wit, the sum of \$2,000, was then and there expended by the said James, in and about the safeguard, defence and recovery, and preservation and reparation of the said vessel; which said sum of money, and the said sum of \$15,000, the defendants, according to the tenor and effect of the said policy, became and were liable to pay said James; all of which premises the Chesapeake Insurance Company aforesaid had notice, to wit, on, &c. at, &c. To this declaration, the defendants below pleaded that they had not broken their covenant, upon which issue was joined.

1. At the trial of this cause, a variety of depositions, documents, and letters, were read, which the reporters do not deem it necessary, for the understanding of the points ultimately decided by either Court, to introduce, but have prepared the following general statement of the evidence offered to the jury.

The plaintiff, to support the issue on his part, proved his property in the ship, the policy of insurance declared upon, and that he had tendered a deed of cession to the defendants, for his interest in the ship *General Smith*, which they refused to accept. He then read to the jury the following copy of a letter sent to the defendants:

“Baltimore, 4th February, 1823.—Gentlemen—I observe by the Boston newspaper of the 29th January, that the ship *General Smith*, insured in your office pr. policy No. 7661, was driven ashore in a heavy gale of wind the 6th of December, and by a Charleston paper of the 26th of January, that on the 13th she was not got off. In so dangerous a situation as *Helvoet roads*, it is to be feared that a total loss * has ensued. I therefore, as a measure of precaution
for both your interest and my own, do hereby abandon to you, 455
and claim a total loss. Respectfully, gentlemen, your obedient
serv't. (Signed,) JAMES BOSLEY.

“To the President and Directors of the Chesapeake Insurance Company.”

The plaintiff then further offered proof, that the ship *General Smith*, upon the voyage mentioned in the policy of insurance declared upon, set sail in ballast from Rotterdam for Baltimore, on the 3d of December, 1822, and anchored about four miles below Rotterdam, on the same day; that on the 5th of December, being at anchor at *Helvoet roads*, with a pilot on board, a violent squall from the S. and W. struck the ship and drove her aground; that on the 6th, a violent gale coming on, notwithstanding the exertions of the master and crew, the ship was driven 100 fathoms upon a mud bank by the force of the wind; that on the 7th the gale moderated; that every exertion was made to get the ship off, without avail; that she fell on her beam ends; at low water the bank was dry, and the people from the ship could walk around her, when she was from 200 to 300 yards from the edge of the water; that ice began to form about the middle of December, and made around the ship in large banks. The ship's ballast was, while she was aground, thrown overboard; assistance was procured from the shore, but with every exertion, the ship was not got off. She remained aground until from the 1st to the 4th of February, when she was at times afloat in her bed on the mud bank. On the 5th the ship floated, but as the ice had then broken, and there was much danger from getting among it, every exertion was made to keep her on the bank, and prevent her getting into the channel way. On the 13th of February, the ship was finally got off, and proceeded to Williamstadt, and afterwards to Dort, where she was hove out, both sides caulked at a heavy expense, and on the 13th

of March again set sail for Baltimore, where she arrived on the 6th April, in a leaky condition. * There was evidence that while the ship was aground, she was materially injured, strained and hogged; that the place on which she grounded, was very much exposed, the weather cold and severe, the crew greatly exposed and frostbitten; that the master was a man of skill and intelligence in his profession, faithful and attentive to his duties. After the ship's arrival at Baltimore, she was libelled by the seamen for wages, condemned, and sold under a decree of the District Court of the United States. The ship after being sold under the decree, was repaired in Baltimore, at considerable expense, and went to sea again.

The defendants offered evidence that the place where the ship was aground, was a soft mud bank, and that she could have been got off the bank at any time with proper exertion, and with little or no damage, and at no great expense; that she was not hogged by being ashore, and that she is still a good ship. Thereupon the plaintiff by his counsel, prayed the Court to instruct the jury as follows;

First. If the jury find from the evidence that Captain Robinson, the commander of the ship in question on the voyage insured, was a man of integrity, and competent skill in his profession, and that after the ship was driven on shore in the manner stated in the testimony, he acted according to the best of his judgment for the interest of all concerned; and if the jury also find, that on the 4th of February, 1823, the time of the plaintiff's abandonment, the ship still continued on shore, and also continued on shore until the 13th of that month, and was at the time of said abandonment, and for some time before and after, in imminent danger of being wrecked, and notwithstanding then the plaintiff is entitled to recover for a total loss, the ship still the ship was afterwards saved, and notwithstanding the jury may find that said Robinson might have erred in not choosing other means within his power; better fitted to the saving of his said vessel; provided they be of opinion, from all the evidence, that said error was such as a man of ordinary skill and judgment, that said experience in the commanding of ships, might, under like circumstances, have committed.

Second. If the jury, find from the evidence, that the ship General Smith, on or about the 4th day of December, 1822, sailed from Rotterdam for Baltimore, on the voyage mentioned in the policy of insurance on which this suit is brought, and while on the said voyage was, on or about the 5th of December, 1822, driven on shore near Helvoet, in the manner stated in the testimony; and if the jury also find, that the ship continued on shore until February, 1823, and Captain Robinson, the master of said vessel, acting according to the best of his skill and judgment, for the interest of all concerned, endeavored to get the vessel afloat to pursue her voyage, where he supposed it to be practicable, and safe to do so; and in, and as, to said endeavor.

oring, acted as a man of ordinary skill and judgment, and experience in the commanding of ships, would, in like circumstances have acted; and if the jury also find, that the said Captain Robinson was a man of integrity, and of competent skill in his trade and business as master and commander of such a ship as the General Smith, for the voyage insured, and that notwithstanding the exertions so made, the said vessel, at the time the abandonment was made, continued aground and on shore, and incapable, therefore, of pursuing her voyage; and if the jury also find, that at the time of said abandonment, it was, and continued to be, uncertain and doubtful, whether she could ever be got off in safety, then the said abandonment is valid, and the plaintiff entitled to recover for a total loss.

Third. If the jury find from the evidence, that the ship General Smith, on or about the 4th of December, 1822, sailed from Rotterdam for Baltimore, on the voyage mentioned in the policy of insurance, on which this suit is brought, and while on the said voyage, was, on or about the 5th of December, 1822, driven on shore near Helvoet, in the manner stated in the testimony; and if the jury shall * also find, that the said ship continued on shore until the 13th 458 of February, 1823, and that during all that time, while she was thus on shore, Captain Robinson, acting according to the best of his skill and judgment, and as a man of ordinary skill and judgment, and experienced in the commanding of ships, would, in like circumstances, have acted, endeavored, whenever it appeared to have been practicable and safe to do so, to get the ship afloat, to pursue her voyage; and if the jury also find, that the said Captain Robinson was a man of integrity, and of competent skill in his profession, as commander of such a ship as the General Smith, for the voyage insured, then, that the ship was by being so cast on shore, arrested, and restrained in her voyage by perils insured against, and on the 4th of February, 1823, had been detained for an unreasonable length of time from the free use and possession of the plaintiff, and therefore the said abandonment is valid, and the plaintiff is entitled to recover for a total loss.

Fourth. If the jury find from the evidence, that the ship in question was driven on shore on or about the 4th of December, 1822, near Helvoet, when pursuing the voyage described in the policy of insurance on which this suit is brought, and continued on shore from that time until February 13th, 1823, and was thereby strained, broken and injured, to the extent and amount of more than half her value, that then the abandonment is valid, and the plaintiff is entitled to recover for a total loss, provided the jury shall also find, that during all the time the said ship was thus on shore, Captain Robinson, the master of said vessel, acted according to the best of his skill and judgment for the interest of all concerned, in and as to endeavoring to get the vessel afloat to pursue her said voyage, and as a man of ordinary skill and judgment, and experience in the commanding of

ships, would, in like circumstances, have acted; and provided also, that they find that the said Captain Robinson was a man of integrity, and of competent skill in his trade * and business as a master
459 and commander of such a vessel as the General Smith, for the voyage insured.

And thereupon the defendants, by their counsel, prayed the Court to give the following instructions to the jury :

1st. That if the jury shall find from the evidence in the cause, that after the ship was blown ashore in Helvoet Roads, she might have been got off at any time anterior to the 13th of February, 1823, at an expense of less than half her value, and been enabled thereby to prosecute her voyage without further delay, and that the means of getting her off were not employed by the master of the ship, owing to his unwillingness to make the expenditure, from an apprehension that it would not be approved and sanctioned by the plaintiff, his employer, and that the ship was thereby delayed in the prosecution of her voyage, from the 6th of December, 1822, to March, 1823; that this delay having been unnecessary, was a deviation, which discharged the underwriters from all damage sustained by the ship subsequent to the time at which she might have been got off.

2d. That if the jury shall find from the evidence in the cause, that the intelligence placed before the defendants by the plaintiff's offer to abandon, of the 4th of February, 1823, did not present the case of an entire destruction of the ship, nor a case in which she had been damaged to more than half her value, nor a case in which a total loss from stranding was in the highest degree probable, the case was not one in which the plaintiff was authorized to abandon, and claim for a total loss, and the plaintiff is entitled to recover only for a partial loss.

3d. That if the jury shall find from the evidence in the cause, that the intelligence placed before the defendants by the plaintiff's offer of abandonment, of the 4th of February, 1823, presented a case in which it was probable that the ship might have been got off from the shore in a reasonable time, at an expense of less than half her value, the case was not a proper case for abandonment, and the plaintiff can only recover for a partial loss.

* 4th. That if the jury shall find from the evidence in the
460 cause, that the ship when blown ashore in Helvoet Roads, and detained there from the 6th to the 13th of December, in the manner described in the plaintiff's offer of abandonment of the 4th of February, 1823, was not in imminent danger from stranding, but was in imminent danger of being detained on the shore till ice would be formed, which might cut her to pieces, that such apprehended danger from ice not having been assumed as the ground of the offer to abandon, cannot be relied on by the plaintiff to support the abandonment; and even if it had been assumed as the ground of the offer to abandon, that the mere apprehension that ice would form, which

might cut the ship to pieces, however reasonable such apprehension may have appeared, would have given no right to abandon: and that the plaintiff, had such been the ground of the offer to abandon, could only have recovered for a partial loss.

5th. That if the jury shall find from the evidence in the cause, that on the 4th of February, 1823, when the offer to abandon was made, the danger from a total loss from stranding was not in the highest degree probable, and that at that time, the only danger that existed, was the danger of the ship's being borne by the water from the shore out into the current among the floating ice, and of being destroyed by the ice; the case was not on the 4th of February, 1823, a proper case for abandonment on the ground assumed by the plaintiff in his offer of abandonment of that date; nor would the case have been a proper one for abandonment had the plaintiff there known and assumed the said apprehended danger from the ice, as the ground of his offer to abandon; and that on the state of facts assumed in this prayer, he is entitled to recover only for a partial loss; but the Court rejected each and every of the said prayers of both plaintiff and defendants, and were of opinion, and directed the jury as follows: That the plaintiff's intelligence of the state of his vessel, authorized the abandonment as offered in evidence, provided the existing state of facts on the 4th of February, authorized an abandonment for a total loss; that the danger from being cut to pieces from the ice, was one of the perils to which the stranding of the vessel exposed her, and if on the 4th of February she was damaged to the amount of more than one-half her value, or was in imminent peril, and the highest degree of probability of actual or technical total loss existing, then the plaintiff is entitled to recover for a total loss, unless the captain had reason to believe that she could be got off in safety, for one-half her value, before the 4th of February, and from any cause whatever neglected to attempt it; that is to say, he was bound to go up to the amount of half her value, unless he had reason to believe that the means actually used by him were sufficient for that purpose. To which rejection of said prayers, as made by the plaintiff, and to the said opinion and direction of the Court, the plaintiff excepted.

The cause having been submitted to the jury; under the foregoing instructions, they found a verdict of \$5,786.36, for the plaintiff. Whereupon the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and DORSEY, JJ.

Mayer, Johnson, and Taney, (Att'y Gen'l U. S.) for the appellants, cited *Rhinelanders vs. Ins. Co. Penn.* 4 *Cranch*, 41; *Marshall vs. Delaware Ins. Co.* 4 *Cranch*, 206, 208; 2 *Marshall*, 578; *Lawrence vs. Ocean Ins. Co.* 11 *Johns.* 293, 295; *Wood vs. Lincoln and Kennebeck Ins. Co.* 6 *Mass. Rep.* 482; *Phil. on Ins.* 459; *Peele vs. The Merchants'*

*Ins. Co. 3 Mason, 27, 29, 41, 48, 53, 57, 58, 65; 2 Mar. 586; Columbian Ins. Co. vs. Catlett, 12 Wheat. 391; Idle vs. The Royal Exchange Co. 4 Serg. and Low. 279; Green vs. The Royal Exchange Co. 6 Taunt. 71; Bishop vs. Pentland, 14 Serg. and Low. 33; Phil. on Ins. 442, 448; 2 Mar. 598, 9, 601; Ralston vs. Union Ins. Co. 4 Binney, 386, 403; Dorr vs. New Eng. Mar. Ins. Co. 4 Mass. 230; 3 Kent, 268; McIver vs. Henderson, 4 Maul. and Sel. * 576; Goss vs. Withers, 2 Burr. 683; 462 Miller vs. Fletcher, Doug. 231; Park Ch. 9, 219; Phill. on Ins. 442; Ib. 391; Anderson vs. Wallis, 2 Maul. and Sel. 248.*

Glenn and Wirt, for the appellee, cited 2 Mar. 590, 565, 601; Dederer vs. Delaware Ins. Co. 2 Wash. C. C. R. 61; Phil. on Ins. 448; Peel vs. The Merchants' Ins. Co. 3 Mason, 27; 3 Kent, 265, 249; Hughes on Ins. 416; Bell on Ins. 610; 2 Mar. 586; Columbian Ins. Co. vs. Catlett, 12 Wheat. 391; Anderson vs. Wallis, 2 Maul. and Sel. 240; Everth vs. Smith, Ib. 278; Falkner vs. Ritchie, Ib. 290; Brotherton vs. Barber, 5 Ib. 418; Cologan vs. London Assurance Co. Ib. 446, 447; Patrick vs. Com. Ins. Co. 11 Johns. 13; Suydam and Wyckoff vs. Marine Ins. Co. 1 Johns. 181, 183; King vs. Delaware Ins. Co. 2 Wash. C. C. R. 309; Phil. on Ins. 448; Wood vs. Lincoln and Kennebec Ins. Co. 6 Mass. 483; 11 Petersd. 466.

DORSEY, J. delivered the opinion of the Court. The first and third bill of exceptions, on the part of the appellant, having been waived or abandoned, our duty is to inquire whether there be such error in the County Court's instruction to the jury, or their refusal of the appellant's prayers in his second bill of exceptions, as would require a reversal of their judgment? The propriety of the Court's denial of the several instructions which they were called on to give, will be first examined.

The first prayer presents an hypothetical statement of facts, not enumerating all which had been proved, but predicated upon, and assuming the existence of those material facts, of which competent and adequate testimony had been offered, and the finding whereof, was indispensable to a recovery. These facts set forth in the bill of exceptions, were as fully in the view of the Court, in making a disposition of the points presented, were as necessarily subjects of consideration, as if they had been incorporated in the statement itself.

The instruction requested could not for * a moment have been 463 sustained; nay, could not have been asked for, but upon this assumption.

The abandonment, one of those important links in the chain of testimony, is expressly referred to, and was to be regarded in the same manner, as if the proof, by which it was established, had been set out in the statement. If no sufficient abandonment had been made, the instruction prayed for could not have been granted. The finding of the facts enumerated, could of themselves form no basis of a recovery, as for a total loss. Before the Court could have instructed

the jury, that the plaintiff was entitled to such a verdict, they must of necessity have determined, that it was warranted by the abandonment. The sufficiency of the abandonment, the correspondence of its grounds with those relied on as evidence of loss, were clearly submitted for, and settled by the determination of the Court below; and notwithstanding the Act of 1825, in reviewing their judgment, form fit subjects for discussion before this tribunal.

The insured is not compelled in any case to abandon, he has an election, which rests in his discretion; but no right to claim as for a total loss in its nature technical or constructive, can vest, until such an election be made. He can only abandon for a total loss; and his election to do so, can never be made until the receipt of the advice of the loss. It has been urged by the appellees, that the intelligence of loss communicated in this case, was of such an unauthentic nature, that the assured was not authorized to rely on its verity, and deal with the underwriters accordingly. But we cannot yield assent to this suggestion. The information received would have carried conviction to any reasonable mind; was positive, untainted by any suspicions as to its truth; and if the facts which it made known, justified his abandoning, the insured was not bound to wait for more authentic advice.

Were the underwriters liable for a total loss, under the abandonment in the case at bar, is the first question to be * disposed of. Before the expression of our opinion, let us refer to some **464** of the authorities pertinent to this subject. In 1 *Johns*. 181, *Suydam et al. vs. Marine Ins. Co.* the Court say, abandonment must be "on sufficient grounds, and the accident occasioning it, must be described with certainty, so as to enable the underwriter to determine, whether he be bound to accept. If he be not, he will of course refuse, and neglect to take measures for its preservation, which is one object of making an abandonment." A similar principle is found in the Court's opinion, in *King vs. Del. Ins. Co.* 2 *Wash. C. C. Rep.* 309. It is incumbent on the insured to state to the underwriter a sufficient reason for the offer to abandon. "This is clear from the nature and use of an abandonment. The underwriter should have an opportunity of judging whether he is bound to accept the offer or not. If bound, that he may do so at once, and take proper means for the preservation of the property." As the assured must at the time of abandoning, state the grounds upon which he makes the abandonment, it is necessary, in order to make the act valid, not only that the existing facts should constitute a total loss; but also that the assured should be informed of the accident, which occasions the loss. He cannot abandon merely upon the apprehension, that a total loss may have taken place, and afterwards establish his right to do so, by facts that subsequently come to his knowledge, and which were wholly unknown to him at the time of making the abandonment *Phil. Ins.* 440. "The underwriters ought to know the grounds of the

abandonment, that they may determine whether to accept. Accordingly, the assured must at the time of making the abandonment, make known to insurers, the reason for which he abandons. He cannot avail himself of any other ground, than that alleged by him at the time of abandoning; and if there be any other facts, (either known, or not known to him at the time,) on which an abandonment would be necessary, in order to entitle him to recover for a total loss, he must abandon anew, before he can recover for such a
465 * loss, on account of those facts." *Phil. Ins.* 448. "The facts of which the insured is informed, and which he makes known to the underwriters, as the ground of his abandonment, must constitute a total loss." *Phil. Ins.* 458.

From the authorities referred to, as well as upon principles of reason, justice and policy, we deem this rule undeniable, that the information which is sufficient to authorize the assured to give notice to the underwriters, that he abandons, must be of such facts and circumstances, as would sustain the abandonment, if existing in point of fact, at the time the notice is given. The mere stranding of a vessel, forms not of itself, a substantive ground of abandonment. The right to abandon on such an occurrence, depends on the attending circumstances. If she be thrown so high upon the beach that her removal is impracticable, or if on a shore where the means of relief are unattainable, or where the exertion of those means would incur an expenditure exceeding half her value, then is the assured at liberty to abandon. To sustain this doctrine so constantly met with in the decisions of Courts of justice, and in writers upon the law of insurance, it cannot be necessary to refer to authorities.

What was the intelligence communicated in this case? Simply this, "I observe by the Boston newspaper of the 29th January, that the ship *Genl. Smith*, insured in your office, per policy No. 7,661, was driven ashore in a heavy gale of wind, the 6th December, and by a Charleston paper of the 26th January, that on the 13th she was not got off. In so dangerous a situation as *Helvoet Roads*, it is to be feared that a total loss has ensued." It has not been contended, that the fears of the insured are equivalent to a total loss, and constitute a ground of abandonment. There is no such head in insurance law, as abandonment *quia timet*. Do the facts disclosed in the notice show a total loss, either actual or technical? for unless they do, the abandonment is wholly defective. If mere stranding be not a total loss, there is no total loss disclosed by the notice. The
466 only facts upon * which such a conclusion could rest, are, that in a gale of wind, the ship was driven on shore, and had remained there seven days. But whether she remained there from choice, to make some inconsiderable repair, as for example, to reship her rudder, or from necessity; whether she was thrown one foot, or one mile, from the channel of the river; whether she lay high and dry, or in ten feet water; whether she had sustained any damage

by the accident; whether any effort had been made to get her afloat; or whether the accomplishment of that object was impracticable, or could be accomplished by the expenditure of ten dollars, or ten thousand dollars, were matters on which the insurer were left to speculate in utter darkness. Can it seriously be urged that the underwriters, by the tenor and spirit of their contract, under such circumstances, were bound to have accepted the abandonment, and thus become the purchasers of the ship, at the valuation in the policy? If there be any case to sustain such pretensions of the appellants, it has not been cited in the argument, and certainly has eluded the researches of the Court.

It has been contended, "that an abandonment does not depend on the information given at the time it is made, but on the facts, or state of the property, at the date of the abandonment." This position cannot be sustained; it has neither principle nor authority to support it. If it were true, it would follow that an abandonment would be effectual where a loss had occurred, although a knowledge of such loss, had never reached either the insurer or insured—that the insured need not make known the intelligence he has received of the disaster—that information of the slightest impending peril would support an abandonment, if at the time it was made, the condition of the thing insured constituted a total loss;—that such doctrine is at war with every adjudicated case on the subject, it can hardly be necessary to remark. Suppose both the insurer and insured to have resided at Rotterdam, or in the immediate vicinity of the place * of stranding, and that on the 13th of December, (the time when the facts relied on, as showing a total loss,) the abandonment had been made; and made too, not only on the grounds stated in the notice, but upon all the circumstances connected with the disaster, could it be insisted that a total loss then existed, in point of fact, or was "in the highest degree probable," or that the moral certainty of its occurrence was such, that upon principles of reason or law, it might be assumed as having already taken place? The ship lay on the bank, free from injury, save an unimportant one to her rudder, which had been repaired. Nothing was required to place her in a state of safety in the stream, but a shifting of the wind to the northward or westward. Could the loosest *dictum* that ever escaped a judicial tribunal, make such a state of things a total loss? If the right of abandonment existed not where the contracting parties resided, at the theatre of the disaster, it derives no additional strength from the fact of their residence being several thousand miles distant. The claim to abandon, depends altogether upon the nature of the intelligence received, which must be communicated to the assurer; but here it is attempted to sustain this abandonment, not upon the facts received by the assured, and made known to the underwriters, nay, not even upon the actual condition of the property insured, at the date to which the intelligence relates, but upon

accidental contingencies, transpiring a month or two months afterwards, and never previously submitted to the insurer, as the basis of the claim. The sufficiency of an abandonment rests not merely on the occurrence of facts, which constitute a total loss, but upon their knowledge by the assured, the communication thereof to the assurer, with an offer to abandon, and the continuance of the disaster at the date of abandonment.

Were we to extend the right of abandonment to the extent to which it has been insisted on in the present trial, it would be carried much beyond any limits heretofore prescribed to it. According to our view of the subject, this *right has been already ex-
468 panded as far as expediency or justice will tolerate. A policy of insurance is a contract of indemnity, not of sale. If, on light grounds, or mere probabilities of loss, a right of abandonment arises, you convert underwriters into traders, and impose on them, if they regard the interests they represent, the duty of inquiring into the nature and value of the cargo insured, the grounds upon which rests the calculation of profit from the commercial adventure, and all the probable consequences of a coercive sale, at a port intermediate the *termini* of the voyage thus compelling the insured to make public that commercial intelligence, upon which his adventure is predicated, and upon the concealment of which depends the success of his enterprise. There is much good sense in the remark by C. J. Willes, in *Willes' Rep.* 640, "that insurances were contracts of indemnity, and not for profit or gain;" and there is equal wisdom in what is found in a learned commentary on insurance law, *Hughes' Ins.* 415,—“It is clear that a policy of insurance, both in its object and form, is merely a contract of indemnity. It contains no stipulation respecting abandonment, has its origin from the nature of the contract, as a contract of indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the thing insured; it is not supposed to be in his contemplation; he is to indemnify only. This being the principle, a practice or doctrine which is calculated to break in upon it, ought to be narrowly watched.”

The cases of *Peele et al. vs. The Merchants' Ins. Co.* 3 *Mason*, 27, and *Fontaine vs. The Phoenix Ins. Co.* *New York*, 11 *Johns.* 293, have been much relied on by the appellants. But is there the slightest similitude between the nature of the facts shewing the loss in those cases, and those which belong to the case before us? In the case in 3 *Mason*, the Argonaut was cast upon the rocks, bilged, the tide flowed freely through her, her sails and rigging cut from the masts, all her furniture removed for safety, the master and crew had de-
469 serted her, expecting her to go to *pieces, if the wind had veered to the north-west, her destruction inevitable, and her situation was so desperate, that there remained of her recovery, but a glimmering ray of hope; under these circumstances, Justice Story held the loss to be total, in accordance with the opinion of Lord El-

lenborough, who in *Anderson vs. Wallis*, 2 M. and S. 240, says, "there is not any case, nor principle, which authorizes a total loss, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment." In the case in 11 *Johns*, the vessel was driven against the rocks at St. Pierre, Martinique, and beating against them some time, was driven so high on shore, that when the gale subsided and the sea become calm, there was only two or three feet water on the outside of her. The master, mate, and supercargo, made depositions that it would cost more than her value to get her off; that a survey was had of the vessel, and she was condemned and sold: the purchaser afterward got her off at an expense of \$500. The Court held, that her situation being desperate at the time of the survey, the subsequent good fortune of the purchasers did not destroy the plaintiff's right to recover for a total loss, unless the jury believed she could have been got off for half her value. It is unnecessary to draw the strong lines of discrimination existing between the cases cited, and that now under consideration. They are authorities against the appellant's right to recover.

This first prayer appears to have been framed, and it was so argued before us, as if intended to call on the Court to decide, that "imminent danger of being wrecked and lost," justified abandonment, and recovery for a total loss. In this aspect of the prayer, we entirely concur with the County Court in its rejection: mere "imminent danger" of a total loss, never has been deemed sufficient ground to entitle the assured to a verdict for a total loss. The Courts have only gone thus far in the cases, where danger was not only imminent but the loss in the highest degree probable.

* We wish to be understood as not expressing any decided opinion in this case, whether if all the circumstances connected with the stranding of the General Smith, from the 5th of December, 1822, to the 6th of February, 1823, or to any previous day, had been inserted in a notice of abandonment, delivered to the underwriters, that the plaintiff would not be entitled to recover for a total loss, but as at present advised, we should deliberate much, and long, before our minds could be brought to the adoption of such a conclusion. 470

The second prayer has been discussed, as if presenting the question, whether the loss were not total, "as by the stranding of the ship, she, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is uncertain." As conclusive of the affirmative of this question, and to show that the right to abandon is immediate and complete, the appellant relies on the rule laid down by Justice Story, in the case of *Peel et al. vs. The Merchants' Ins. Co.* 3 *Mason*, 65, where a learned and elaborate review is taken of most of the English and American cases on the subject, in the conclusion of which, that enlightened jurist says,

“the right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owners, and the time when she will be restored to him in a state to resume the voyage, is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit, and objects of the voyage.” This literal construction, and technical application of the rule, is wanting in candor and justice to the learned Judge. His rule was extracted from the adjudicated and admitted principles and cases that he refers to, which immediately precede it, and on which he relies as its basis. It ought not, therefore, in fairness, to be applied to cases in no wise analogous in their circumstances: but admitting the correctness of its application to the perils enumerated, embargoes,

471 blockades, *detentions, submersions, and shipwrecks, which cannot be repaired in the ports where the disasters happen, it surely is not a fair or rational interpretation of the Judge’s opinion, to embrace within it the case of mere stranding, when in a preceding part of the same opinion, he states it to be a position “incontrovertible, that the mere stranding of the ship is not, of itself, to be deemed a total loss, so as to entitle the insured immediately to abandon.” If, however, the true exposition of this rule, be such as is given it by the counsel for the insured, we must be excused in withholding from it our approbation. They allege that the General Smith being aground, “for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him, in a state to resume the voyage, is uncertain,” and therefore the insured may rightfully abandon. By the same system of reasoning, every stranding would confer the same right; as the time of disentanglement from such a peril is ever a matter of uncertainty. Before we could yield our assent to the rule thus literally expounded, the words, “and the time when she will be restored to him in a state to resume the voyage is uncertain,” must be stricken out, and their place supplied by the following insertion; “and that she will be restored to him in a state to resume the voyage, is highly improbable.” But we must not be understood as recognizing this literal and forced construction of an isolated section of the Court’s opinion. It is manifestly contradicted both by what precedes and follows the introduction of this clause: mere stranding being *in limine* alleged to be no ground for abandonment, and the first sentence that follows the rule, and which was designed to illustrate and announce its true meaning and operation, and the ground upon which it was predicated, declares, “that in such a case the law deems the ship, though having a physical existence, as ceasing to exist, for purposes of utility, and therefore subject to be treated as lost.” Could such an absurdity be imputed to the law,

472 that it should deem a ship as ceasing to exist for purposes of *utility, and be treated as lost, because she was grounded on a

beach, from which she would be extricated by the first favorable change of the wind? Such was the condition of the ship, now the subject of litigation, at the time she was seen by those whose reports of her disaster reached the owner, and formed the ground of his abandonment. But it is an useless consumption of time, to inquire whether the facts relied on in the second, third, and fourth prayers of the appellants, in contemplation of law, amount to a total loss. They were not made the ground of abandonment, nor are they consequences to have been anticipated, as necessarily flowing from them: the offer to abandon, having failed to show the condition of the ship desperate, her total loss, in the natural course of things inevitable, or "in the highest degree probable," was wholly invalid, and consequently, the very substratum of the plaintiff's action having failed, all prayers sanctioning his right to recover for a total loss, were properly rejected by the Court.

Having disposed of the first branch of this case, the only remaining inquiry is, has the appellant any just reason to complain of the instruction given by the Court to the jury. To justify the reversal of a Court's judgment, on the ground of their having given an erroneous instruction to the jury, it must be made appear, that the appellant actually, or probably, did sustain an injury thereby. No matter how erroneous the instruction, if it could work no prejudice to the appellant, it forms no ground for reversal. So far from the appellant being prejudiced by the Court's instruction, it conferred on him an essential benefit, to which, in our view of the subject, he was not entitled. It permitted the jury, upon a state of facts which they were left at liberty to find, to give the appellant a verdict as for a total loss, whereas the direction ought to have been, that from the insufficiency of the abandonment, they were not authorized to give such a verdict, no matter what the proof might be. Therefore, although we disapprove, in part, of the instruction given to * the jury by the Court below, we deem it no fit subject of 173 complaint to the appellant.

Concurring with the County Court in their rejection of the appellant's four prayers, in the second bill of exceptions, and seeing no ground of reversal in their instruction to the jury, we affirm the judgment.

Judgment affirmed.

Note.—After the verdict in this cause, the plaintiff moved for a new trial; and filed in Court as the foundation of that motion, the depositions of nine of the jurymen,—declaring, that they had considered in making up their estimate of the plaintiff's damages, that he had received the proceeds of the sale of the ship General Smith, at or about the time of her being sold by the marshal, in July, 1823, and that he had been accordingly charged with interest upon such proceeds, from the supposed time of its receipt by him, until the rendition of the verdict, and that they believed the other jurors acted upon the same views.—The fact was, that the plaintiff received those proceeds in 1827. The motion for a new trial was resisted, upon the principle,

that the deposition of a juror, was not competent evidence to prove this mistake; and the whole subject was most elaborately discussed.

The County Court, ARCHER, J.—I have carefully examined the cases cited in the argument of this case, and am of opinion, that the testimony of jurors cannot be heard to impeach their verdict, whether the conduct objected to in the jury, be misbehavior or mistake. The New York cases are full to this point—so are the cases in England, since the Revolution, though very contradictory before that period. The cases in 2 T. R. in 6 Cowan and 1 Wendell, decide, that no evidence can be received from the jury, to show mistake. I think these decisions right, because, were the law different, an inquisition might be instituted in every case, into the grounds and motives of a jury for their finding, in order to ascertain whether, in coming to given conclusions, they had not mistaken facts. Verdicts of juries, would then in all cases, be uncertain. To permit such inquisition into the motives of juries, would it appears to me, be against public policy, and lead more frequently to the prostration of justice, than to its preservation.

Independent of the above ground, I should be opposed to a new trial in this case. Treating the loss of the plaintiff as partial, and not as total, (for with this branch of the jury's finding, no fault has been found,) I am not satisfied that injustice has been done to the plaintiff. He has obtained a verdict for \$5,786, and has received \$4,692 from the sale of the vessel, making in all, the sum of \$10,478.—Now when the probable deterioration of such a vessel, on such a voyage, is taken into consideration, I am by no means clear, that the indemnity of the plaintiff has been inadequate. Besides, considering this as a partial loss, the time when Mr. Bosley received the
474 * proceeds of the sale, would seem to be entirely immaterial to any just determination of the case,—for if the loss were partial, the property in the vessel and its proceeds alway remained in him, and he might employ them, or let them remain idle, without at all affecting the subject-matter of inquiry here.

The motion for a new trial is overruled.

JAMES FLACK *vs.* CHARLES GREEN.—December, 1831.

The promissory note of I. endorsed by G. and P. fell due at Washington, on the 6th, where payment was then demanded, and refused. The notices to the endorsers were enclosed in a letter addressed to P. at Baltimore, and mailed at Washington on the evening of the 6th. The mail left Washington every morning, and arrived at Baltimore at an early hour the same afternoon. Both the endorsers lived in Baltimore, and notice was delivered to G. the first endorser, on the 9th. *Held*, that G. was discharged from his liability as endorser, the notice being one day too late; in legal presumption the notice reached P. on the 7th. (a)

After evidence had been given, that a letter containing two notices for endorsers upon a dishonored note, had been mailed under cover to one of them, at W. directed to B. where they both resided, it was proposed to prove, that it was the invariable and uniform practice of the endorser's house and counting-room, to which the notices had been directed, to forward such notices immediately upon the receipt of them, and the witnesses who were employed in such counting-room, had no doubt, and

(a) See *Bell vs. Bank*, 7 Gill, 216.

believed, from the course of their business, that they had forwarded one of the notices to the other endorser. *Held*, that the proposed evidence was incompetent, to prove the delivery of a notice in due time to the other endorser. (b)

No person can become a party to a bill, unless his name appears on some part of it. (c)

One whose name is not upon a bill, though interested in it, is not entitled to the benefit of the rule, that each party is entitled to an entire day, for the purpose of giving notice to the person preceding him, on a dishonored note or bill.

APPEAL from Baltimore County Court. Assumpsit by the appellant, as endorsee, against the appellee, as the endorser of a promissory note for \$482.80, dated Washington, March 3d, 1825, payable at eleven months, of which one John Pic, of that place, was the maker. The general issue was pleaded.

* 1. At the trial the plaintiff proved the endorsement of Charles Green, who resided in the City of Baltimore at the 475 time the note became due; and also proved the signature of said Pic, the maker; and then read in evidence the testimony of John G. McDonald, notary public, residing in the City of Washington, taken under a commission issued for that purpose, viz: "I find by reference to my notarial book, that a similar note to that now exhibited to me, marked A, was delivered to me by the President and Directors of the Bank of Washington, to be presented for payment, to the drawer thereof, and that after the hour of three o'clock in the afternoon, on the 6th day of February, 1826, I presented the said note for payment, at the store of John Pic, in Washington City, and demanded payment of it, and was answered by a lady officiating therein, and believed by me to be the wife of the said John Pic, that Mr. Pic was not within, and that it could not be paid. I then prepared a notice of the non-payment, addressed it to Charles Green, and a similar notice addressed to Henry Payson & Co. the second endorsers on the note; which notices I enclosed and put into the post office in the City of Washington, on the evening of the same day, addressed to Henry Payson & Co. Baltimore, Maryland; the next morning I returned the note to the President and Directors of

(b) Approved in *Pocock vs. Hendricks*, 8 G. & J. 421. Distinguished in *Bell vs. Bank*, 7 Gill, 228. Cited in *Brailsford vs. Williams*, 15 Md. 159. In *Bell vs. Bank*, the Court said that, although no reason is assigned for the rejection of the testimony offered in the case in the text, "yet it was manifestly too loose and vague to raise the presumption it was intended to convey. Time, the essential ingredient in the notice, is indefinite. It does not appear when the letter was received by the house, or how soon after it the notice was forwarded to the endorser. It does not prove through what channel or direction, by whom or whose business it was among the partners and clerks of the house to see it expedited, and whether it was forwarded by mail or personal message."

(c) Cited in *Brailsford vs. Williams*, 15 Md. 158.

the Bank of Washington, accompanied by the protest made by me." And for the purpose of shewing that the notice of non-payment addressed to Charles Green, the defendant, and mailed at Washington, on the 6th day of February, 1826, under cover to Henry Payson & Co. the next succeeding endorsers to the said defendant; as set forth in the evidence of John G. McDonald, was transmitted to the defendant in due time, the plaintiff offered to prove by Henry P. Sumner, a member of the mercantile house of Henry Payson & Co. that it was the invariable and uniform practice of that house, to forward such notices immediately upon receipt of them, and that he had no doubt, from the course of their business, that they had

476 forwarded this particular notice to Charles Green, * but that he had no recollection upon the subject of forwarding this particular notice to the defendant. That from the general course of their business, and from the particular custom of their counting house, in respect to such notices, he believed that the notice in question had been duly transmitted to the defendant. And the plaintiff further offered similar evidence, by all the clerks of the house of H. P. & Co. To this evidence the defendant objected, as being incompetent, and inadmissible to prove that notice of the non-payment of the said note was received by, or given to, the defendant: which objection the Court [ARCHER, C. J.] sustained, and refused to permit the said evidence to be given to the jury. The plaintiff excepted.

2. In addition to the testimony given in the preceding bill of exceptions, and which is hereby made a part of this exception, the plaintiff still further to support the issue on his part, proved by Henry W. Kiser, a legal and competent witness, that the following notice—

Mr. Charles Green.—“Baltimore, 9th February, 1826. Dear Sir: The note of John Pic, for \$482.80, of your endorsement, has come to hand protested. I now feel you, as the endorser, bound for the payment of the note, and I shall hold you as such, and shall expect the payment of the same in the course of to-day or to-morrow.

“JAMES FLACK.”

Is in his hand-writing, and that at the time it bears date, he was a clerk in the employ of the plaintiff, and that by the direction of the plaintiff he delivered a notice, of which the above is a true copy, on the 9th of February, 1826, at the store of Coley and Green, of which firm the said defendant was a partner. And the plaintiff then proved by Henry P. Sumner, that soon after Messrs. Flack & Co., of which firm the plaintiff was a partner, became known to Henry Payson & Co., Mr. Samuel B. Coley, the partner of the plaintiff, stated, that from the nature of their business as brewers, or mixers of liquors, and manufacturers of cordials, that they would require foreign liquors and wines, to * use in their establishment, and that he stated **477** at the same time, that they were strangers in Baltimore, and did not wish to keep a bank account, and would therefore wish Henry

Payson & Co. to collect their bills receivable, and that in purchasing such articles as suited their business, they would buy from Henry Payson & Co. when they could get them upon as favorable terms as from other persons; that after such understanding, the house of James Flack & Co. dealt largely with Henry Payson & Co., purchasing various articles of merchandise on credit, and placing with them various promissory notes, from time to time, as they received them in the course of their business; that Henry Payson & Co. occasionally advanced sums of money to said Flack & Co. as they required them, which they so advanced, as well for their personal confidence in Flack & Co. as in the faith of the said notes, which they had deposited with them in the course of their dealings as aforesaid. And also proved by the same witness that the amount of notes credited Flack & Co. in their account current with the house of Payson & Co. included the note on which the present suit is instituted; and that the charge therein afterwards stated of the said note, to the debit of James Flack, was in consequence of the said note having been returned protested for non-payment by the drawer, who resided in the City of Washington, and that the dealings of the said house of Henry Payson & Co. with James Flack continued after the dissolution of the partnership of James Flack & Co., without any new understanding between them as regards advances, and that such advances were made after such dissolution in the same manner as before; that they kept a mutual interest account with each other, both before and after the dissolution aforesaid, and that from the nature and course of their dealings with the said house of Flack & Co. and with the said plaintiff, after the dissolution aforesaid, they considered themselves as the bankers of the said Flack & Co. and of the plaintiff, after the dissolution aforesaid; and the said witness being asked by the counsel for the *defendant to give a definition of the word "banker" as he applied it to this particular case, stated, that he meant there- 478 by to express "a sort of combined agency in the purchase of goods, and collection of notes, and making advances of money." It was proved on the part of the defendant, by the cross-examination of the said witness, that Henry Payson & Co., when they received the notes for collection from Flack & Co., placed them in their books as bills receivable, and when they were paid, placed the amount thereof to the credit of Flack & Co.; that Henry Payson & Co. did not consider themselves in any way bound by the receipt of such notes, unless the money due on them was paid at their maturity; that all the expenses of collecting the said notes were paid by Flack & Co.; that no advance was made by Henry Payson & Co. on the note on which the suit was brought, and that if the same had been paid at maturity, and Flack had called for the money paid thereon, it would have been given to him as his own money; and that if the note had not been paid, and Flack had asked for the advance of that amount of money, it would have been given to him on his personal credit; that Henry Payson

& Co. were not in the habit of receiving notes for collection from persons residing in the City of Baltimore, and that witness had no knowledge that any other note was placed in the hands of Henry Payson & Co. for collection, except those received from Flack & Co., and that they were not the bankers of any other house in the like manner in which they were the bankers of Flack & Co.; and further proved that the store of Coley and Green was about five hundred yards distant from the store of Flack; and further proved, that the said note was not endorsed by James Flack, the plaintiff, at the time it fell due; and that the mail from Washington to Baltimore left the former place early in the morning, every day for the latter, where it arrived at an early hour in the same afternoon: whereupon the defendant prayed the Court to instruct the jury that the plaintiff is not entitled to recover, and assigned the following reasons: 1. That the
479 * plaintiff had not used due and reasonable diligence in the delivery of notice to the defendant, of the dishonor of the note on which this suit was brought. 2. That such notice being delivered on the 9th of February, 1827, was one day too late; and 3. That there was no evidence of notice to charge the defendant as endorser of the note on which this suit was brought; which instruction the Court [ARCHER, C. J.] accordingly gave.

The plaintiff excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, STEPHEN, and DORSEY, JJ.

Johnson, for the appellant, cited *Miller vs. Hackly*, 5 *Johns.* 375; *Pritt vs. Fairclough et al.* 3 *Camp.* 305; *Hagedorn vs. Reed*, *Ib.* 379; *Scott vs. Lifford*, 1 *Ib.* 246, 249; *Chitty on Bills*, 213, 225, 318, 319; *Longdale vs. Trimmer*, 15 *East*, 291; *Mead and Rogers vs. Engs*, 5 *Cow.* 303; 3 *Kent*, 73.

Gill, for the appellee, cited *The Cumberland Bank vs. McKinley*, 6 *H. & J.* 527; 3 *Kent*, 46, 75; *Chitty on Bills*, 22, 23, 316; *Bank of Columbia vs. Magruder*, 6 *H. & J.* 181; *Bank of Columbia vs. Fitzhugh*, 1 *H. & G.* 248; *Vincent vs. Harlock et al.* 1 *Camp.* 442, 443, note 1; *Smith vs. Mullett*, 2 *Camp.* 248; *Darbishire vs. Parker*, 6 *East*, 5, 6, 7; *U. S. States vs. Barker*, 12 *Wheat.* 560; *Morgan vs. Woodworth*, 3 *Johns. Cas.* 89.

STEPHEN, J. delivered the opinion of the Court. This suit was instituted in Baltimore County Court, by the appellant, against the appellee, upon a promissory note drawn by a certain John Pic, in favor of the appellee, by whom it was endorsed to the appellant. The general issue was pleaded, and on the trial of the cause, the plaintiff proved the endorsement of the payee on the note, who
480 *resided in the City of Baltimore at the time the note became due, and also the hand-writing of the maker. John Pic,

the maker of the note, residing in the City of Washington, the note was transmitted to the Bank of Washington for collection by Henry Payson & Co. of Baltimore, as the agents of James Flack, by whom it had been placed in their hands for a similar purpose. When the note became due, it was placed by the bank in the hands of a notary, who demanded payment thereof, which being refused, he prepared a notice thereof, addressed to Charles Green, and a similar notice addressed to Henry Payson & Co., who were endorsers on the said note; which notices the notary endorsed and put in the post-office, in the City of Washington, on the evening of the same day, addressed to Henry Payson & Co. at Baltimore. In this case, two bills of exceptions were taken in the Court below. In the first exception, for the purpose of showing that the notice of non-payment, addressed to Charles Green, the defendant, and put into the post-office at Washington, on the 6th February, 1826, the day the note became due, under cover to Henry Payson & Co. the next endorsers, was transmitted to the defendant in due time; the plaintiff offered to prove by sundry witnesses that it was the invariable and uniform practice of that house to forward such notices immediately upon receipt of them, and that they had no doubt from the course of their business, that they had forwarded this particular notice to Charles Green, the defendant, but that they had no recollection upon the subject of forwarding this particular notice to the defendant. That from the general course of their business, and from the particular custom of their counting house, in respect to such notices, they believed the notice in question had been duly transmitted to the defendant. To this evidence the defendant objected, as being incompetent, and inadmissible to prove that notice of the non-payment of the said note was received by, or given to him; which objection the Court sustained, and refused to permit the said evidence to be given to the jury. *In this opinion of the Court we do not think there is any error. 481

In the opinion given by the Court in the second exception, we also entirely concur. The note became due on the 6th February, 1826, and the proof offered in this exception established the fact, that Green, the defendant, never received notice, until the 9th of that month, which was unquestionably one day too late. The name of Flack was not endorsed upon the bill; and in *Chitty on Bills*, 23, the principle is stated to be a general one, "that no person can become a party to a bill, unless his name appears on some part of it." For this rule he refers to the opinion of *Buller*, in the case of *Fenn vs. Harrison*, in 3 *Term*, 759, where he says: "In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid. His security appears wholly on the face of the bill itself. The acceptor, the drawer, and the endorsers are all liable in their turns, but they are only liable, because they have written their names on the bill." The law seems to be well settled, that where all

the parties reside in the same place, each party has a day to give notice. In 1 *Wheat. Selw.* 295, the law is laid down to be, "where there are several endorsements, and the holder gives notice of dishonor to his endorser, neither that endorser, nor any prior endorser is bound to transmit the notice of dishonor on the very day on which he receives it. Each successive endorser will be considered as having used due diligence, if he transmit the notice of dishonor, on the day after it is received, in a case where all the parties live in the same place; but if he neglect giving the notice on that day, and the day after, it will be too late." In *Jameson vs. Swinton*, 2 *Camp. N. P. C.* 373, the same rule was recognized by Lawrence, J. viz: "that each party to the bill has a day to give notice." The name of Flack not being upon the bill in this case, he was not entitled to the benefit of the principle, that each party is entitled to an entire day for the purpose of giving notice. * "The putting of a letter into the
482 post-office, giving the notice, is sufficient, without proof of its having been actually received, and if the party to be affected with the notice, reside in a different place from the holder, the notice may be sent through the post-office, to the post-office nearest the party entitled to such notice;" 1 *Wheat.* 298; *Bank of Columbia vs. Magruder*, 6 *H. & J.* 181. According to the admission of the parties, it appears, that the mail left Washington City early in the morning, and arrived in Baltimore, at an early hour the same afternoon. In legal presumption, the notice must have reached Payson & Co. on the 7th February, who were legally bound to deliver notice to Green on the following day. This not having been done, we are of opinion, that the Court below were right, in the opinion expressed by them in the second exception, and affirm their judgment.

Judgment affirmed.

JOSHUA COCKEY *vs.* JONATHAN FORREST.—December, 1831.

Z. being insolvent, and desirous to raise money, applied to F. and obtained his promissory note for \$250, payable 60 days after date to Z. for the purpose of selling it to raise money. No consideration was paid for the note. Z. endorsed the note in blank, sold and delivered it to the plaintiff, who was ignorant of its being a lent note, for the sum of \$200. The maker of the note was in good circumstances. *Held*, that this note was usurious and void.

APPEAL from Frederick County Court. Assumpsit by the appellant, the endorsee, against the appellee, the maker of a promissory note.

At the trial the plaintiff offered in evidence the following promissory note, the hand-writing of the drawer and endorser being admitted; viz:

* “\$250. Westminster, February 26th, 1827. Sixty days after date, I promise to pay to the order of Wm. Zollickoffer, **483** two hundred and fifty dollars, for value received. Jonathan Forrest. Endorsed,—Pay the contents to Joshua Cockey. Wm. Zollickoffer.” And then read in evidence by agreement, the following statement of facts. It is admitted that the note upon which this suit is brought, was executed by the defendant, whose name is signed thereto. That Wm. Zollickoffer wished to raise money, and not being able to do so upon his own note, he being insolvent, applied to the defendant, and obtained the note in question, for the purpose of selling to get money. That the note was executed for the purpose of selling, and without any consideration. That Zollickoffer sold the same to Cockey, the plaintiff, for two hundred dollars, and endorsed and delivered it to him in blank. The words “pay the contents to Joshua Cockey,” were put there by the plaintiff’s counsel before the suit was brought. It was also admitted that the defendant, at the time said note was executed, and endorsed to the plaintiff, was, and now is, in good circumstances as to property, and abundantly able to pay the amount therein expressed; and that Zollickoffer was, and still is insolvent. That the plaintiff had no notice, or knowledge, that said note was an accommodation note, given to raise money. Upon this statement, the defendant prayed the Court to instruct the jury, that the plaintiff was not entitled to recover upon the ground, (according to an amendment of the record made by consent, upon the argument of the cause in the Court of Appeals,) that said note was avoided by the statute against usury. The County Court gave the instruction as prayed. The plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, and DORSEY, JJ.

Ross, for the appellant, cited 5 *Rand.* 425; 1 *Serg. and Low.* 74; 1 *Peters’ S. C. Rep.* 43; *Bennett vs. Smith*, 15 *Johns.* 355; 4 *Cowen*, 279; *Powell vs. Waters*, 8 *Cowen*, 689; *Gilmor*, 42; 5 *Rand.* 333; 3 *Serg. and Low.* 93, note 13; 4 *East*, 57; *Wiffen vs. Robert*, 1 *East*, 261; 7 *Johns.* 361; 13 *Johns.* 52; 15 *Johns.* 56; *Davison vs. Franklin*, 20 *Serg. and Low.* 363; 2 *Term R.* 72.

* *Palmer*, for the appellee. The question is, was the note negotiated upon a usurious consideration. The rule is, that **490** all contracts which are substantially usurious, are void, no matter what means or terms are employed to avoid the statute.

It is admitted, that a *bona fide* purchaser of a note, or bond, will be protected, though he gives less than the amount it expresses; but it must be an actual purchase, and its payment must not be guaranteed by the seller. If it is so guaranteed, or the note endorsed by the borrower, it is no sale, but a loan of money. This is stronger than the case of *Sauvovine vs. Brunner*, 1 *H. & G.* 477, because in

that case, the note was in the hands of a *bona fide* holder, whilst here it is in the hands of the usurer. He referred also to 7 Johns. 26; 1 Mass. Rep. 217; 1 Wm. Blk. 445.

The Court considering this case decided by *Sauerwine vs. Brunner*, 1 H. & G. 477, *Affirmed the judgment.*

491 * CHARLES CARROLL of Carrollton vs. MARSHAM WARING et al.—June, 1832.

Since the passage of the Act of 1785, ch. 72, sec. 25, the practice of the Court of Chancery in England, in the case of a plea ruled to be sufficient, when set down for argument, to make the complainant pay £5 costs, is repealed, and a fine should be paid only by the party pleading or demurring, whose plea or demurrer is overruled. (a)

Where it fully appears, upon the face of a complainant's bill, that there had been a sufficient lapse of time to make the bar created by the Act of Limitations, a defence to the suit, it is not necessary to verify the plea of limitations by an oath; nor is it necessary to support such a plea by an answer, where there was nothing charged in the bill in avoidance, or which could take the case out of the Statute of Limitations. (b)

The payment of interest upon a bond, is no avoidance of the Act of Limitations, of this State, nor will even an express acknowledgment of the debt revive the remedy upon a bond barred by that Act. (c)

APPEAL from the Court of Chancery. The case is sufficiently stated in the following opinion, delivered by his honor, BLAND, Chancellor, at December Session, 1830.

This case standing for hearing, as to the sufficiency of the several pleas for the defendants, heretofore filed, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The plaintiff, Carroll, by his bill, filed on the 24th of February, 1830, states, that Thomas S. Lee being indebted to him on the 21st of April, 1798, in the sum of £3,000 sterling, he, with Marsham Waring, and Notley Young, as his sureties, bound themselves in a joint and several bond of that date, conditioned for the payment of

(a) Cited in *Rider vs. Gray*, 10 Md. 299; *Seebold vs. Lockner*, 30 Md. 137. See Rev. Code, Art. 65, sec. 52.

(b) Cited in *Hall vs. Ridgely*, 33 Md. 310.

(c) Cited in *Mullikin vs. Duvall*, 7 G. & J. 380; *Lamar vs. Manro*, 10 G. & J. 65; *Leonard vs. Hughlett*, 41 Md. 388. Where the remedy on a single bill has become barred by the statutory lapse of time, the mere payment of interest on the debt will raise no such promise as will support assumpsit for the amount due on the single bill. Nothing less than an express promise to pay the amount due thereon, made after the statute has become a bar to the remedy on the bond itself, will suffice to maintain an action of assumpsit to recover the amount due. *Leonard vs. Hughlett*, *supra*.

that sum, on demand, with interest from the 23d of November next before the date of the bond. That he sued, and recovered judgment on the bond against Waring, at April Term, 1810; that Waring by his will, dated on the 17th of May, 1812, gave all his estate, real and personal, to his son, Marsham Waring, and soon after, in the same year, died; that the late Marsham Waring left a large amount of property, but * that the whole of his real estate had been exhausted since his death, in making satisfaction of a debt with which he had encumbered it, by a deed prior to the judgment against him; that Notley Young, the other security in the bond, died some time in the year 1798, leaving a large amount of property; that his personal estate is insufficient to pay his debts; that his executors are also dead, and that administration *de bonis non*, with the will annexed, has been granted on his personal estate; and that the greater part of the interest on said bond has been paid him; but that all of the principal, and a part of the interest, is still due. Upon which the bill prays, that the executor of the late Marsham Waring, and the administrator of the late Notley Young, may account, respectively, for the personal assets which had come to their hands; that the real estate of the late Notley Young, may be sold, to pay the plaintiff and his other creditors, and that process may issue against the executors, the administrator, and the heirs and devisees of the late Marsham Waring, and the late Notley Young, therein named as defendants. The bill says nothing of the situation of Thomas S. Lee, the principal debtor, nor is he made a party to the suit. On the 27th of September, 1830, Robert Y. Brent, the administrator of the late Notley Young, filed his separate plea of the Statute of Limitations, in bar of the whole cause of action, relying on the facts as stated in the bill, that the bond, or thing in action, had been more than twelve years standing prior to the institution of this suit; and on the same day Marsham Waring, the devisee of the late Marsham Waring, and Notley Young of Ben., and Eleanor Clagett, two of the heirs or devisees of the late Notley Young, filed their joint and several plea of the Statute of Limitations, in bar of the whole cause of action, in which they rely on the facts set forth in the bill, that the bond, as well as the judgment against Marsham Waring, this defendant's testator, or those things in action, had been more than twelve years standing, before the filing of this bill. And on the 29th of July, 1830, Marsham Waring, * the executor, filed his separate plea of the Statute of Limitations, in bar, relying on the facts as stated in the bill, that the things in action, the bond and the judgment, against his testator, had been more than twelve years standing before the commencement of this suit. None of the pleas are sworn to, nor any of them accompanied by an answer purporting to be in their support, or by an answer of any kind. Without replying to them, the plaintiff set them down for argument, to obtain the opinion of the Chan-

cellor as to their sufficiency; and as to that alone, the parties now ask the judgment of the Court.

The plaintiff has objected to these pleas, because they do not negative the savings, as to the impediments of infancy, &c., spoken of in the Act of Limitations, relied on by them. The Act here referred to, is that of 1715, ch. 23, which is so nearly analogous to the English statute upon the same subject, that it has been generally construed, and applied, in the same manner. The 6th section, here particularly relied on, is peculiar to Maryland. There is no English Statutory Limitation, as to bonds and judgments; but like the English Statute of Limitations, after prescribing a limitation to actions upon those securities, it concludes with a saving in favor of infants, &c. after such impediments are removed. In equity, as well as at law, it has been always held to be sufficient, that the defendant should, in his plea of the Statute of Limitations, rest upon the fact, that the debt became due, or that the cause of action had accrued, beyond the prescribed time, before the suit was brought, without showing that the case did not fall within any of the savings of the Act, which are exceptions in favor of the party suing, and therefore if his case falls within any of them, it is for him, and not the defendant, to show it. There is, therefore, no foundation for this objection to these pleas. The plaintiff has also urged, that these pleas ought not to be received, because they are not on oath; and in reply to this objection, it was contended that this is a creditor's bill, and that in all such cases, the

defendant, or any co-creditor, has *always been allowed to
494 take advantage of the Statute of Limitations against any claim, merely by filing a note of such objection, without oath; and that for these, and other reasons, apparent upon the proceedings, it was not necessary that these pleas should have been put in on oath. As regards the course of proceeding on a creditor's bill, it is true, that from necessity, in some particulars, and for convenience in other respects, many of the established rules of the Court, as between the plaintiff and defendant, have been dispensed with, or put aside, in relation to creditors who come in after the commencement of the suit. As to the claim of the originally suing creditor, the defendant is specially called on to answer by the bill, and therefore, as to the claim so presented, he cannot be allowed to demur, plead, or answer, in any other manner than according to the established course of the Court. But the other creditors of the defendant are called on, in general terms, to come in, and file the vouchers of their claims in the Chancery office, by a given day; and not being allowed to retard, or incumber the proceedings, with any tedious, or very special allegations, respecting their several claims, it is but reasonable that the defendant, as well as any co-creditor, should be allowed to rely upon the Statute of Limitations, or any other objection, in opposition to them, in the same summary and informal manner in which the claims themselves have been permitted to be introduced into the cause;

hence it has always been deemed sufficient, for a defendant or any co-creditor, to file a short note, in any form, and without oath, of his reliance upon the Statute of Limitations, in opposition to any such claim. This, however, is a course of proceeding which has been sanctioned, because of the peculiar nature of the case, and can in no respect be deemed a precedent applicable to the case under consideration. It may be regarded as a general rule, in equity, that in all cases where the defendant undertakes to rest his defence upon any matter of fact, not stated in the bill, and only sustainable by proof, other than that of a record, or some * public testimonial, he must make oath to the truth of the facts he so advances as a defence. And further, that in all cases where the defendant puts his defence into the form of an answer, whether it be confined to that which is strictly responsive to the bill, or contains much matter in avoidance, it cannot be received without being sworn to by him, unless the plaintiff consents to its being filed without oath. Generally, a plea in equity shows some fact, or new matter, not stated in the bill upon which the defendant relies as an excuse for not answering as the bill requires, and upon which he rests his defence against the relief claimed by the plaintiff, and therefore, in general, all pleas must be upon oath, where the fact relied on is such as must be proved by the testimony of witnesses. If, however, the plea relies upon any public record, or other matter, of which the Court must take notice, or which may be shewn by a record, as upon a former decree in relation to the same matter in bar, then, if the decree be enrolled according to the English mode, the defendant may make profert of the record, without swearing to the plea, because to the verity of the record there can be no addition by the defendant's oath; but if the decree be in paper only, so that it cannot be shewn to the Court, then the plea must be on oath. *Form Rom. 56.* A plea resting upon a statute alone, is a plea of matter of record; but if it be necessary to couple any mere matter of fact with a statute, in order to constitute or complete defence, then the plea must be on oath, because the defence would be unavailable without an averment of such fact, and the defendant must verify by his oath all such facts which he advances as a defence; as where the plea relied on the statute against selling pretended titles, which prohibits all such bargains, except the vendor had been, one year previous to the sale, in possession of the estate, the averment that the plaintiff had not been so in possession, is a fact, without which the statute can be of no avail to the defendant; and therefore, his plea resting so far on a mere fact as well as upon a statute, it was required to be substantiated * by his oath. *Coop. Rep. 34; 2 Ves. and B. 357; 2 Harr. Pr. Ch. 591, 598.* A plea is an excuse for not answering as the bill requires, and therefore a defendant cannot, by plea, offer an excuse, and then go on to answer as the bill requires; because such an answer is an admission that there is no reason why

he should not so answer; and therefore, by such an answer, he virtually waives and overrules his plea. But there are many cases in which he must answer certain portions of the bill, in support of his plea, as where a mortgagee files a bill to foreclose, and actually states a case upon which he might be barred of relief by the Statute of Limitations; but as it were in anticipation of that defence, alleges that the mortgagor had repeatedly acknowledged the debt to be due, and had made sundry payments within the time which would otherwise have operated as a bar; in such case, if the defendant pleads the Statute of Limitations in bar, he must support his plea by an answer, denying the acknowledgments and payments alleged in the bill; because if he did not do so, as those allegations would be taken for true, they would take the case out of the statute. This is said to be an incongruous form of pleading; and it is necessary in all cases where there is matter stated in the bill, and not covered by the plea, which would, if not answered and denied, be a sufficient reply to the plea; but here there is no allegation that anything has ever been paid on the judgment, and the general averment of the bill, "that the greater part of the interest on said bond has been paid him, but all the principal, and a part of the interest, is still due," without any specification as to the time when such payments of interest were made, is entirely too vague and indefinite to take the case out of the statute, admitting it to be literally true; and there is no intimation in the bill of any other circumstances which could prevent the running of the statute against both the bond and judgment. *For. Rom.* 58; *Mit. Pr.* 212; 3 *Atk.* 358. By Lord Bacon's orders it is declared that "a demurrer is properly upon matter defective, contained in the bill itself, *and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed, or excommunicated, or there is another bill depending for the same cause, or the like; and such plea may be put in without oath, in case where the matter of the plea appears upon record; but if it be anything that doth not appear upon record, the plea must be upon oath." *Beam. Ord.* 26. From which it appears, that the peculiar quality in which a plea essentially differs from a demurrer is, that a plea rests on some new matter not set forth in the bill; whereas, a demurrer is founded exclusively upon the matter apparent on the face of the bill: a plea admits the truth of those facts only of the bill, which are not covered by it—but a demurrer admits the truth of the plaintiff's whole case, and only denies that he is in equity entitled to the relief he asks, even supposing all the facts stated by him to be true; hence a demurrer is never required to be sworn to, because it neither controverts any facts stated by the plaintiff, nor advances any new matter of fact, the truth of which may be denied or put in issue. *For. Rom.* 93. It is also declared by Lord Bacon's rules, that where any suit appears upon the bill to be of the nature of those which are reg-

ularly to be dismissed, such as bargains at play, or wages, or bargains for offices, &c. such matter is to be set forth by way of demurrer, *Beam. Ord.* 27; and hence, as it would seem, it has become a general rule, that a plea to be good must state some new matter, which is a bar of the plaintiff, and not like a demurrer, rest on facts in the bill; but if, instead of doing so, the defendant relies, by way of plea, altogether on the facts apparent on the face of the bill as a bar, the plea will be overruled; because the bill being open to a demurrer, a plea cannot be resorted to upon such ground as a defence. 1 *Mad. Rep.* 228; 2 *Mad. Rep.* 8; *Mit. Pr.* 235.

But although a plea is generally expected to advance some new matter, not found in the bill, as a bar; yet this *does not apply to what is called a negative plea—as where the plaintiff 498 claimed only as administrator, and the defendant pleaded that he was not administrator, the plea was allowed; and yet it is obvious that it advanced no new matter, but rested the defence upon a simple denial of one of the component parts of the plaintiff's title as set forth in his bill. 2 *Ch. Cas.* 10; 3 *Ch. Rep.* 71; 1 *P. Will.* 767; 1 *Vern.* 473; *Dick.* 510; 1 *Cox*, 198; 11 *Ves.* 302.

Every bill assumes two positions; first, that the Court has jurisdiction of the case; and secondly, that the plaintiff has the capacity to sue, as stated in the bill; and therefore, a plea to the jurisdiction, or in disability of the person which denies one of those positions amounts to no more than the denial of the title to relief from that Court, or to that person, admitting all other facts to be true as stated. But there are pleas in disability of the person, such as infancy, coverture, or insolvency, which do not rest exclusively upon the statements of the bill; and yet it is said, in the rules digested by the Chancellor of the Republic of England, which were afterwards literally adopted, that a plea in disability of the person, or to the jurisdiction of the Court, should be received and filed. *Beam. Ord.* 172, 488. Whence it would seem to have been laid down as a general rule that such pleas need not be put in on oath; because, if in any case where a plea is required to be sworn to, it is not put in on oath, it will be considered as a nullity, and ordered to be taken off the file. *Pra. Reg.* 274; 2 *Ves. and Bea.* 357. It is a general rule in equity, as well as at law, that a defendant cannot have the benefit of the Statute of Limitations, unless he in some way particularly asks for it. At law, where it appears by the declaration that the case is within the statute, the defendant cannot have the benefit of it by demurrer; he can only take advantage of it in such case by plea, 2 *Saund.* 63, note 6; and in equity it is almost always taken advantage of by plea, or by being specially relied on in the answer; indeed it was at one time doubted, whether the benefit of it could be had in any * other way; because it was said, the plaintiff should not, by a demurrer, be precluded from bringing his case within some 499 of the savings, or exceptions of the statute, either by amending his

bill, or by putting in a special replication. 3 *Atk.* 226. But where a mortgagor comes to redeem, it is the law, or rule of the Court of equity, that he must show a good title to redemption, within twenty years, or he cannot be relieved; and therefore, it appears upon the face of the bill, that he has not brought his case within that rule, or that he has stated no fact or circumstance, which can take his case out of the operation of the statute, the defendant may demur, and rely on the Statute of Limitations as a cause of demurrer. 3 *Bro. C. C.* 635; 2 *Sch. and Lef.* 638; 19 *Ves.* 115; 1 *Ves. and Bea.* 536. From this review of the subject, it appears, that when the oath of the defendant, as in the case of a plea which relies exclusively upon a matter of record, can add nothing to the verity of the fact set out in the plea, or as in the case of a demurrer, or a plea to the jurisdiction, when the facts relied on by the plea, are only those set forth by the plaintiff himself in his bill, there the plea need not be put in on oath.—Whence it is clear, that where the lapse of time appears upon the face of the bill, as in this instance, without any allegation of an acknowledgment, payment, or other circumstance which can take the case out of the statute, the defendant may take advantage of the statute, either by a plea, or by a demurrer; and such plea or demurrer need not be sworn to, because the oath of the defendant cannot be required by the plaintiff, to verify facts, which he himself has stated to be true.

Where three or more are bound by a joint and several bond, a suit may be brought on it, either against all, or any one of the obligors; but not against any intermediate number of them. But this bill is filed against the representatives of only two of the obligors, without in any manner accounting for, not having made the other a party. *Yelv.* 26; *Hard.* 198; 1 *Hen. and Munf.* 61. It is a general rule in

500 * equity, than when a debt is joint and several, the creditor should bring all his debtors before the Court. The exceptions to this rule are, first, when the party omitted, is only a surety; but here, Thomas S. Lee, is stated to be the principal debtor; secondly, where nothing has been paid, and the co-obligor is insolvent; but here, there is nothing said about the insolvency of Lee; thirdly, where the co-obligor is dead, and there are no personal assets; but here it is not said that Lee is dead without leaving assets; and lastly, where a judgment has been obtained against one of the obligors, who alone is sued, because the judgment drowns the bond, and makes him alone liable: but this bill is against the representatives of the one security, resting on their liability on the bond alone; and against the representatives of the other surety, resting on their liability on the judgment obtained upon the bond. Considering this as a case against sureties alone, whose principal was insolvent, and who were, from the nature of their liability, entitled to contribution from each other, the bill may be well founded; and the joint and several plea of Marsham Waring, and Notley Young, of Ben., and Eleanor

Claggett, who, although chargeable, the one on the judgment, and the other two on the bond alone, may yet, in respect of their being sureties, and entitled to contribution in payment of the same debt, be permitted thus to join in a defence against the same claim. But in equity these defendants ought not, from the plaintiff's own showing, to be made to pay anything, much less to be put to call for contribution from each other, if their principal be solvent; for although the Court must by a general decree, bind them all alike in favor of the plaintiff, yet it ought to decree over, in favor of the sureties against the principal; which cannot be done in this case, because he is not here as a party. 2 *Vern.* 195, (note;) 3 *East*, 258; 2 *Atk.* 436; 3 *Atk.* 406; *Dick.* 738; 16 *Ves.* 306; 1 *McCord*, 301; 5 *Oran.* 330; 2 *H. & G.* 309. Upon the whole then, I am of opinion, that the bill has not made, or sufficiently accounted for not having made one a party to this * suit, who is represented as the principal debtor; and the case must therefore stand over with leave to amend in that **501** respect. I am also of opinion, that all these pleas must be deemed sufficient as the case now stands.

According to the English course of proceeding, which has been, and unless repealed, is now the rule of this Court, either party may set down a plea to be argued; and if it be allowed, the plaintiff pays five pounds; but if it be overruled, or ordered to stand for an answer, with liberty to except, without a saving as to the payment of costs, the defendant pays five pounds. *For. Rom.* 54. The object of this regulation seems to be, to make the unsuccessful party pay for the costs, and trouble of the argument thus called for, in order to ascertain the sufficiency of the plea; and it is perfectly reasonable, that the peril of incurring such costs and expense should be entirely reciprocal. But our Act of 1785, ch. 72, sec. 25, only declares, "that the party whose demurrer or plea is so overruled upon argument, or withdrawn, shall pay to the opposite party, the sum of five pounds current money, and the costs thereof." There is nothing in this provision, which negatives the ancient reciprocal rule of the Court; and therefore, considering the old rule as still in force, and as founded on reason and justice, I shall apply it accordingly.

Whereupon it is on this 28th of January, 1831, adjudged and ordered, that the pleas of the defendants be, and the same are hereby deemed sufficient; and the said plaintiff is required to admit, or reply to the same. And it is further ordered, that the said plaintiff pay to each of the defendants, the sum of five pounds, current money, and the costs of the said plea to be taxed by the register, and be in contempt until the said sum of money and costs be fully discharged and paid. And it is further ordered, that this case stand over, with leave so to amend, as to make Thomas S. Lee, or his representatives, parties, or to show why they ought not to be made * parties to this suit; or to amend in any other manner, which the nature **502** of the case may require.

From this order, the complainant **appealed** to the Court of Appeals.

The cause was argued before **EARLE, MARTIN, and STEPHEN, JJ. Speed**, for the appellant, contended. 1. That the pleas of the Act of Limitations should have been sworn to. *Coop. Eq.* 251, 252. 2. That they should have been accompanied by answers, showing that none of the payments of interest alleged by the bill to have been made were made within twelve years. 2 *Ves. and Bea.* 354; 1 *Mad. Rep.* 204; 5 *Ib.* 204; *Eq. Draft.* 443. 3. The Chancellor erred in deciding the question of parties, when the only matter submitted to him, was the sufficiency or insufficiency of the pleas. 4. The old rule making the fine reciprocal in cases of this description, is **repealed** by the Act of 1785, ch. 72, sec. 25, according to which the complainant is not liable to it.

Flusser, for the appellees. 1. When the plea relies entirely upon the case made by the bill, and introduces no new matter in avoidance, it is good, though not sworn to, or supported by an answer. *Coop. Eq.* 231, 232; 1 *Newl. Pr.* 116; 2 *Mad. Ch. Pr.* 308, 310, 311; *Boehm's Pr.* 323, 334, &c.; *Mitf. Pr.* 208; 4 *H. & J.* 539; 1 *Madd. P.* 25, 2. There is no fact contained in this bill, which made it necessary to swear to the plea, or to accompany it with an answer. The case made by the complainant, is subject to the bar of the statute, and there is nothing for an answer to deny. *Coop. Eq.* 227, 313; 3 *Johns. C. C.* 384; 4 *H. & J.* 126; 1 *G. & J.* 272; *Mitf.* 40. 3. That part of the Chancellor's order, which relates to parties, decides no matter of right, and is not the subject of an appeal. 4. Upon this point, he referred to 1 *Newland*, 121.

503 * **STEPHEN, C. J.** delivered the opinion of the Court. Although it appears to be the practice of the Court of Chancery in England, in a case of a plea, ruled to be sufficient, when set down for argument, to make the complainant pay five pounds costs, 1 *Newl. Ch. Pr.* 121, we do not consider that such a principle of practice can be sanctioned in this State, since the Act of 1785, ch. 72, sec. 25, which contains in our opinion, a strong and irresistible implication, that a fine should be paid only by the party pleading, or demurring, whose plea or demurrer should be overruled. This express legislative provision, imposing a fine upon the party pleading or demurring, we consider a rejection of the English practice, which imposes a fine upon the complainant, where the defendant's plea is allowed, or ruled sufficient; as it cannot readily be perceived, why the imposition of the fine, was confined by that law, to the party pleading or demurring, if it was intended that such principle of practice should be extended to the opposite party likewise. Upon the subject of the legal sufficiency of the pleas filed in this case, we concur in opinion with the Chancellor. We do not think that it was necessary, that the pleas should have been verified by an oath. Whether here had been a sufficient lapse of time, to make the bar created by

the Act of Limitations a defence to the complainant's suit, fully and explicitly appeared upon the face of his bill. There was therefore no conceivable reason for requiring that the plea should be supported by such a sanction. Equally unnecessary was it, that it should have been supported by an answer; because there was nothing charged in the bill, in avoidance of, or which could take the case out of, the operation of the Act of Limitations. The payment of interest, if it had been precisely, or definitely alleged in point of time, it is clear, both upon reason, and authority, would not have had that effect; because the language of the statute of this State, in the case of a bond, is, positive and peremptory, that no bond shall be good and pleadable, or admitted in evidence, after the principal * debtor and creditor have been both dead twelve years, or the debt, or the thing in action, above twelve years standing, 504 saving to the creditor the usual benefits, or exceptions of infancy &c. It is also incontrovertibly established, that not even an express acknowledgment of the debt, will revive the remedy upon the bond, when barred by the operation of the Act.

The decree of the Chancellor is therefore reversed, and the case sent back for further proceedings, agreeably to the principles herein contained.

Decree reversed.

DANIEL CARROLL, of Duddington vs. LEE, Adm'r of LEE.—June, 1832.

A separate estate in a wife, in personal chattels, was unknown to the common law; like her person, her property was under the control of her husband.

A separate property may now be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee.

To exclude the marital rights over her property, a clear intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary, but adequate language must be employed in making a gift, to manifest a decided intention to transfer a separate interest. (a)

A gift of plate to a married woman, unexplained as to intention, is a gift, to which the marital rights instantly attach, and the thing given, immediately becomes the property of the husband.

When property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case. (b)

So, where the defendant is within the State, and the land, or other property in contest, is beyond its limits, although the proceeding is in rem. the

(a) Cited in *Hutchins vs. Dixon*, 11 Md. 87; *Chew vs. Beall*, 13 Md. 360; *Brandt vs. Nickle*, 28 Md. 449. See Rev. Code, Art. 15, sec. 19.

(b) Approved in *Keyser vs. Rice*, 47 Md. 211.

Court of Chancery has jurisdiction. To enforce a decree in such a case, the proceeding may be *in personam*, as well as by injunction, to recover the possession of the thing disputed.

Where the property has been removed from the State, and the defendant resides out of its limits, his appearance to the suit, and answer to the bill, for the purpose of contesting the merits, is waiver to any objection to the jurisdiction of the Court, although in his answer he also excepts to it. (c)

505 * APPEAL from the Court of Chancery. The present bill was filed by the appellee, Wm. Lee, as administrator of Mary Lee, on the 1st of November, 1827, against the appellant, and one Daniel C. Sim. The bill stated, that a certain Ignatius Digges, of Prince George's County, in the State of Maryland, being possessed of a large quantity of silver plate, by his last will and testament, dated in 1784, (a copy of which is exhibited with the bill,) bequeathed the same to his wife, Mary Digges, for life, remainder to his grandson, Ignatius Digges Lee; but in case he should die before he attained the age of twenty-one, or unmarried, then to Mary Lee, the intestate of complainant, and her heirs; that Mary Digges, the wife of the testator, and the executrix named in his will, took out letters testamentary, and assumed the burden of the execution thereof; that Ignatius Digges Lee, died before he attained the age of twenty-one years, and unmarried, after which Mary Digges delivered to the intestate of complainant, sundry pieces of the plate, thereby recognizing the authority of Ignatius Digges to dispose of it; that Mary Digges has since departed this life, having made and duly executed her will, of which Daniel C. Sim is the executor, and bequeathing to Daniel Carroll, (the appellant,) of the District of Columbia, a considerable portion of the aforesaid plate, (which the bill enumerates,) and which her executor accordingly handed over to Carroll, the legatee, who is now in possession of the same, claiming title thereto, under the will of the said Mary Digges.—Prayer, That said Carroll, and Sim, the executor, may be decreed to deliver complainant the pieces of plate aforesaid, of which they may respectively be in possession, or pay the value thereof, and for general relief; and an order for publication is prayed against Carroll.

Carroll in his answer, says, that he resides out of the State of Maryland, and that the whole subject-matter of the suit, was, at the time of filing the bill, and now is, beyond the limits of this State, as the complainant in his bill charges; he therefore objects, and pleads to the jurisdiction of * the Court, in the premises.

506 The answer then admits, that Ignatius Digges died as stated, having by his will, of which his wife, Mary Digges was executrix, bequeathed the plate, as the bill charges; that Ignatius Digges Lee, died under twenty-one years of age, and unmarried, and that

complainant is the administrator of Mary Lee; that he the defendant holds the plate under the will of Mary Digges, who died in 1825, to whom it properly belonged; that it was in no wise subject to the will of her husband, Ignatius, even though she might have been in possession of it during his life-time, as in that event, it constituted a portion of her paraphernalia, over which her husband could exercise no control, by any attempted testamentary disposition. The jurisdiction of the Court was also objected to, upon the ground that the subject-matter of the controversy is cognizable in a Court of common law. The answer denies that Mary Digges delivered any portion of said plate to Mary Lee, in pursuance of the provisions of her husband's will, or that she ever, in any way acquiesced in the power assumed by him in his will, to dispose of the same, if his will does in fact assume such power. It also denies, that the limitations in the will are valid and effectual, in reference to such property, to vest the title in Mary Lee, although the intention of the testator may have been such as the complainant assumes it to have been, on the contrary, the answer insists that Mary Digges, the first taker, took an absolute and indefeasible estate therein.

The answer of Sim, the executor of Mary Digges, admits the execution of the wills, and the deaths of the several parties, as stated; that he had delivered a portion of the plate, as the bill charges, to Carroll, the other defendant, in compliance with the will of his testatrix, in which he insists he was justifiable, as the same was given to his testatrix by her brother, after her intermarriage with Ignatius Digges, and was always during her life, considered by her, as her sole and separate property.

* It was proved, under a commission, that the plate in question was given to Mary Digges by a brother, during her coverture. 507

BLAND, C. at December Term, 1830, decreed, that the defendants, Daniel C. Sim, and Daniel Carroll, of Duddington, forthwith transfer and deliver over to the plaintiff, the several pieces of silver plate, in the proceedings mentioned, which have been hitherto held and detained by the said defendants, and that they pay the plaintiff his costs.

From this decree the defendant, Carroll, appealed to this Court.

The cause came on to be argued at June Term, 1832, before EARLE, MARTIN, and STEPHEN, JJ.

Speed, for the appellant, contended, 1. That the complainant had a legal remedy. 2. That the plate being the paraphernalia of the wife, the husband could not dispose of it by will, though by the same will, a benefit might be conferred upon, and enjoyed by her. *Brinkman vs. Brinkman*, 3 Atk. 358, 394; 2 *Ib.* 79. 2. He argued, that a present to a wife, by a stranger, during coverture, is a gift to her

separate use, and the husband has no control over it. 3 Atk. 93. 3. Carroll, the defendant, and the subject of the suit, being both beyond the limits of the State, the Court has no jurisdiction.

No counsel argued for the appellee.

EARLE, J. delivered the opinion of the Court. The pieces of plate which form the subject of dispute between the parties in this case, are claimed by the appellee, under the will of Ignatius Digges, and by the appellant, Daniel Carroll, of Duddington, under the will of Mary Digges, the surviving wife of Ignatius Digges. What were the respective rights of these testators, while living, * to this **508** property, presents the inquiry at this time first to engage the attention of the Court of Appeals. All the testimony in the cause, was taken on the part of the appellee. From this it appears, that the disputed plate was given to Mary Digges, by one of her brothers after her marriage with Ignatius Digges; and the question we have to decide, is, whether by the gift it became her sole and separate property, or devolved on her husband, and made a part of his personal estate. A separate interest in a wife in personal chattels, was unknown to the common law. Like her person, her property was under the control of her husband. This strictness has been much relaxed by the decisions of the Courts of equity. It is now fully established, that a separate property may be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee. To exclude, however, the marital rights over her property, a clear intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary to create a separate use, but adequate language must be employed, in making the gift, to manifest a decided intention to transfer a separate interest; to show that the husband was not to enjoy what the law would otherwise give him.

Is this the character of the gift we have now to review? It was made, it is presumed, by parol, and many years have elapsed since it was made. What the declared intention of the giver was, if his intention was expressed, is lost in time, and must forever remain a secret to us. All we know is, it was a present of plate from a brother to a married sister. Can we, from this circumstance of relationship, and from the nature of the subject given, infer an intention in him, to give it to her, for her separate property? This is the particular point that awaits our decision, and it does not seem to us, that we need be slow in giving it. It is plain, this naked gift does not justify an inference, that it was her brother's decided intention to give to Mary Digges this plate, for her sole, separate use. We are aware of the case * of *Brinkman vs. Brinkman*, adverted to in 3 Atk. **509** 392, where such a gift of plate, from the father of the husband to the wife, immediately on her marriage, was construed to pass the property to her separate use; but we do not feel disposed to yield to

it, as an authority. It is a case not regularly reported, and in our apprehension, the subject-matter of the gift does not justify the inference, that it was designed for the separate use of the wife. We consider plate as an article of family use, and one that makes as much a part of the household, as any that belongs to it. It is then our opinion, that a gift of plate to a married woman, unexplained as to intention, is a gift to which the marital rights instantly attach, and that the thing given immediately becomes the property of the husband.

There is a further question in this case, that requires a moment of our attention. It arises out of the plea put in by the appellant, to the jurisdiction of the Court. The plea states the facts, which are conceded by the pleadings, that at the time of filing the bill, the appellant resided in the District of Columbia, where he had in his possession the plate sought to be recovered. Ought the Chancellor to have disregarded the plea, and decreed, as he did, the delivery of the plate, is then the point of inquiry? Where property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case. 1 *Atk.* 19; 2 *McCord Ch.* 437. So where the party defendant is within the State, and the land, or other property in contest, is beyond its limits, although the proceeding is *in rem*, we apprehend there is no want of jurisdiction in the Chancellor. To enforce a decree in a case of this kind, the proceedings may be *in personam*, as well as by injunction, to recover the possession of the thing disputed. This is the case of *Penn vs. Lord Baltimore*, 1 *Ves. Sen.* 454, where Lord Hardwicke held, that the property in dispute being in the Plantations, was no legal impediment to making the decree, the parties to the suit being in England. *The subject before us, however, is supposed to afford a stronger case, inasmuch as both 510 the party and property were without the limits of Maryland, at the institution of the suit, of which the defendant was notified by an order of publication. There might be something, perhaps, in this concurrence of facts, if the property had not been removed out of the State, and the appellant had not appeared and answered the bill, as well as except to the jurisdiction. This he did, and contested the question of merits before the Chancellor, whether the complainant had a right to recover: and if the decree had been in his favor, would assuredly have forced his adversary into the Court of Appeals, or forever barred him from a further suit for the same property. To say nothing of the effect of the answer upon the plea, this, we conceive, is a waiver of it, and a submission to the jurisdiction, and brings the subject as much within the power of the Court, as in the case of *Penn vs. Lord Baltimore*, where the party resided within the Chancery jurisdiction.

Decree affirmed.

STEWART, Trustee of STONE vs. STONE et ux. AND WHITE.—June, 1832.

It is an established principle of evidence, that the answer of one defendant cannot be received in evidence against a co-defendant. If the complainant wishes to establish a fact, by the evidence of a co-defendant, he may be examined as a witness on interrogatories, which will afford the other defendant an opportunity to cross-examine him. (a)

In a suit in Chancery, by the permanent trustee of an insolvent debtor, it is necessary to show, that the complainant gave bond with surety in that character before filing his bill, and although the allegation in the bill, to that effect, was admitted in an answer by one defendant, yet as respects another defendant, whose answer was silent in relation to that fact, proof of the bond with surety was held requisite.

511 * Where the Court of Appeals is of opinion that a bill dismissed generally by the Chancellor, should have been dismissed without prejudice, the practice is to reverse the decree of the Chancellor, and pass a new decree. (b)

APPEAL from the Court of Chancery. On the 24th January, 1829, a bill was filed by the appellant, David Stewart, as permanent trustee of Samuel Stone, against the appellees, Samuel Stone and Barbara his wife, and Jacob White.

The bill stated, that Stone became indebted to one Chas. Salmon, in the year 1826, for goods, &c. sold him by Salmon, to the amount of \$490.53, for which he gave his promissory note, payable in six months, from the 3d May, in the year aforesaid. That said note not being paid at maturity, suit was instituted upon it, and judgment obtained in September, 1828. That a *ca. sa.* issued thereon, which was served on the defendant, on the 3d January, 1829, and on the 6th of the same month, the said defendant applied for, and obtained a personal discharge, under the insolvent laws of the State. That on the 14th of the same month, complainant was duly appointed his permanent trustee, and gave his bond as such, which was duly approved by the Commissioners of Insolvent Debtors for the City and County of Baltimore. That the insolvent returned no property on his schedule, at the time of his application. The bill then charges, that at the time Stone became indebted to Salmon, as aforesaid, he (Stone) was in possession of a considerable estate, both real and personal, and evidences of debt amounting in the whole, to not less than \$3,000. That for the purpose of defrauding his creditors, he, on the 27th August, 1828, united with his wife, in a conveyance of the whole of the said estate to Jacob White, in trust for his said

(a) Affirmed in *Brierch vs. McCauley*, 7 Gill, 196. and *Reese vs. Reese*, 41 Md. 559.

(b) Approved in *McElderry vs. Shipley*, 2 Md. 37. Cf. *Benascotter vs. Green*, 60 Md. 383.

wife, as will appear by reference to the conveyance, a copy of which the complainant exhibits with his bill. And he charges, that said conveyance was made by Stone, under an expectation of becoming an insolvent debtor, and for the purpose of giving an undue and improper preference to * the wife, and is therefore absolutely null and void, and the property meant to be conveyed, is **512** vested in complainant as trustee of the insolvent. The bill then prays, that said deed may be declared void, and the property be delivered to complainant, for the benefit of the insolvent's creditors, and for general relief.

The answer of Barbara Stone, admitted that she had been informed of certain dealings, and mercantile transactions, between her husband, Samuel Stone and Charles Salmon, though she had no personal knowledge on the subject. She also admitted that she had been informed, "that the said Samuel Stone hath made application for the benefit of the insolvent laws of Maryland, and that the complainant hath been appointed his permanent trustee for the benefit of his creditors." The answer then goes on, to deny the fraud charged by the bill, and asserts, that the deed which it seeks to vacate, was made in pursuance of an ante-nuptial contract, (exhibited with the answer) entered into between her and her present husband, Stone, on the 2d February, 1826, five days before their intermarriage.

The answer of Samuel Stone the insolvent, admits, that in the spring of 1826, and subsequent to his intermarriage with Barbara, he became indebted to Charles Salmon, in the manner, and to the amount stated in the bill, for which he gave his note as charged. That suit was instituted thereupon, judgment recovered, this respondent arrested, that he petitioned for, and obtained the benefit of the insolvent laws, as likewise alleged; that complainant was appointed his permanent trustee, and gave bond as such trustee, which has been approved by the Commissioners of Insolvent Debtors for the City and County of Baltimore. After denying the fraud, this answer also sets up the *ante-nuptial* contract, relied on, and exhibited with the answer of Barbara Stone, and alleges, that the deed sought to be annulled, was made in pursuance thereof, and not for the purpose of defrauding his creditors.

* The answer of Jacob White, the other defendant, is not material; and the proof taken under a commission related merely **513** to conversations with the insolvent, before and after he petitioned, in reference to the claim of another creditor. There was no proof that complainant had given a bond with security, as trustee.

BLAND, C. (at March Term, 1831,) dismissed the bill with costs. From this decree the complainant appealed to this Court.

The cause was argued before MARTIN, STEPHEN, and DORSEY, J.J. *Boyle and Gill*, for the appellant, referred to the Act of 1805, ch. 110, sec. 9; 1807, ch. 53; 1812, ch. 77, sec. 1; 1816, ch. 221.

Scott, for the appellee, cited *Winchester* vs. *The Union Bank of Maryland*, 2 G. & J. 73.

MARTIN, J. delivered the opinion of the Court. We think the Chancellor was correct in dismissing the bill in this case. In forming this opinion, this Court have not taken into consideration, what is deemed the merits of the case, the deed, the ante-nuptial contract, the fraud, and the undue preference, &c. We think that the complainant has not shown himself entitled, to bring those questions before the Chancellor. He has alleged in the bill, that he is the permanent trustee of Samuel Stone, and as such, has given the bond required by law. To clothe him with the authority he claims in his representative character, this allegation ought to have been admitted by the defendants, or established by other evidence. The record contains no other evidence upon this subject. The answer of Samuel Stone admits that complainant was appointed his permanent trustee, and gave bond as such trustee, &c.; but this answer * cannot
514 be used against Barbara Stone, the party interested in the deed. It is an established principle of evidence, that the answer of one defendant cannot be received in evidence against a co-defendant. If the complainant wishes to establish a fact by the evidence of a co-defendant, he may be examined as a witness on interrogatories, which will afford the defendant an opportunity to cross-examine him. Barbara Stone, in her answer says, she has been informed, that Samuel Stone hath made application for the benefit of the insolvent laws of Maryland, and that the complainant hath been appointed his permanent trustee, for the benefit of his creditors. If this is deemed an admission that the complainant was permanent trustee, yet she is entirely silent as to the bond. There is then, no legal testimony in this record, to shew that complainant ever did give a bond, with security, as required of him by law, as the permanent trustee of Samuel Stone; that this was necessary, before he went into Chancery, see the case of *Winchester, trustee of Williams* vs. *The Union Bank of Maryland*, 2 G. & J. 73, where the Court say, the different insolvent laws of the State constitute one general system, and must be construed together; and so construed, require a bond, with security, to be given before a trustee can act as such; without which, he cannot be invested with the character and rights of a trustee.

Under this view of the case, we think the bill ought to have been dismissed, but without prejudice, &c. The complainant ought not to be precluded, if he has equity, from again presenting himself before the Court; and to afford him that opportunity, we think it necessary to reverse the decree, but without costs, and to pass a new decree to dismiss the bill, without prejudice, &c.

Decree reversed.

INDEX TO 3 G. & J.

References are to top pages.

ABATEMENT.

1. The death of one of the parties named as defendant in a writ, before the impetration of it, is ground of abatement. *McLaughlin vs. De Young*, 4.
 2. Judicial writs do not in general abate by the death of the party. *Hanson vs. Barnes*, 217.
- See* APPEAL AND ERROR, 1, 2.
PLEADING, 1, 2.

ACCOUNT.

1. An action of account is the only action that can be brought against a guardian, *qua* guardian, in a Court of law, other than an action on his bond. *Green vs. Johnson*, 238.
2. Limitations apply to the action of account. *Ib.*

ACTION.

1. Where two are bound for the payment of a specific sum, and one pays the whole, he can either at law or equity, call upon the other to contribute, and thus recover a moiety of what he has paid. *Owens vs. Collinson*, 19.
2. M. and J. gave their joint and several single bill, upon which an action was brought against the administrator of J. The defendant moved the Court for a non-suit under the Act of 1825, ch. 167, suggesting, that M. was alive, and within the county at the institution of the suit. The County Court decided that a motion was a proper mode of bringing the question before the Court, and awarded a non-suit. *Held*, upon appeal, that the Act of Assembly had no application to the case. *Blizzard vs. Jacobs*, 48.
3. Where two obligors united in a bond, and one of them is dead, the 1st section of the Act of 1825, ch. 167, does not prohibit separate actions against the survivor, and the representative of the deceased; nor does it apply where only one suit has been brought, although all the obligors are alive, and reside in the same county. *Ib.*
4. Where the obligors are all alive and reside in the same county, and the obligee elects to sue one of them only, he cannot bring another suit afterwards against the others, without being subject to a non-suit. *Ib.*
5. The office of the 2d section of the Act of 1825, ch. 167, is to provide for the case of the death of one or more joint and several obligors, where the judgments being different, the surviving obligor or obligors cannot be united in the same action with the representative of

ACTION.—*Continued.*

the deceased obligor or obligors. There the creditor at his election may have one or two suits, one against the survivor, and another against the representative. Yet if there be more than one survivor living in the same county, he is as to them, restrained to one suit. *Ib.*

6. Where obligors live in different counties, the creditor may sue on both, or either, at his election. He is however restricted, as to original parties to his bond, to one suit in each county. *Ib.*

See ACCOUNT, 1.

ASSUMPSIT.

CONFLICT OF LAWS, 2.

EQUITY, 24.

EXECUTORS AND ADMINISTRATORS, 8, 9.

PROMISSORY NOTES, 1.

TRESPASS QUARE CLAUSUM FREGIT, 2.

TRUSTS AND TRUSTEES, 5.

ADVANCEMENT.

See DESCENT AND DISTRIBUTION, 1.

ANNUITY.

See PLEADING, 5.

WILLS, 4.

APPEAL AND ERROR.

1. An appeal from a decree of the Chancellor cannot properly be taken, after the death of the only complainant in the cause, in the name of such complainant; and neither the appearance of the representatives of the deceased party, after a suggestion of the death in the Appellate Court, nor the appearance of the other party there, cures the defect. The Court on motion dismissed such an appeal. *Owings vs. Owings*, 1.
2. The Act of 1785, ch. 80, sec. 1, (to prevent the abatement of actions) does not apply to causes in the Appellate Court. *Ib.*
3. The Acts of 1806, ch. 90, sec. 11, and 1815, ch. 149, secs. 5, 6, relate to causes in the Court of Appeals, but neither of them relates to an appeal prayed from Chancery in the name of a deceased person. *Ib.*
4. A judgment of the County Court, upon an issue joined on a plea of *nul tiel record*, cannot be reviewed in the Appellate Court, when the appellant did not except to that judgment, and incorporate the record which was submitted to the Court in a bill of exception, nor put any matter upon the record to shew why such judgment should not be rendered. *Ayres vs. Kain*, 18.
5. The objection of the competency of a witness, by whose proof a mere interlocutory order, not the subject of an appeal, was obtained, is open to consideration in the Appellate Court, though more than nine months had elapsed, between the passage of the interlocutory order, and the time of taking the appeal from the final decree. *Hungerford vs. Bourne*, 85.
6. Where the Appellate Court reverses the decree of the Court of Chancery, it exercises as it were an original equity jurisdiction, and places that decree upon the record, which the Chancellor ought to have given. Upon cross appeals, therefore, from the same decree, errors

APPEAL AND ERROR.—*Continued.*

- of which one party below, since the Act of 1825, could not have availed himself upon his appeal, because not excepted to, may be corrected by this Court in remodelling the Chancellor's decree upon the appeal of the other party. *Diffenderffer vs. Winder*, 189.
7. The Court of Appeals will direct an audit to be made, and new accounts stated, where it is necessary to enable them to pass a final decree in the cause. *Ib.*
 8. A prayer by the defendant addressed to the Court requesting them to instruct the jury, that "the plaintiff upon the evidence, is not entitled to recover upon either count in the declaration," is, since the Act of 1825, ch. 117, too general in its terms, and the refusal to grant it, is not the subject of an appeal. *Penn vs. Flack*, 224.
 9. Although the judgment was affirmed because the prayer offered by the appellant was too general, yet the Court expressed its opinion on the whole case. *Ib.*
 10. Where a party at the trial of a cause makes a general prayer to the Court, which is refused, and the Court then proceeds of their own accord to give a specific instruction to the jury, which was excepted to, this Court upon appeal will review such instruction, although since the Act of 1825 it would not have regarded the general prayer. *Sothoron vs. Weems*, 269.
 11. Under the Act of 1825, ch. 117, the Appellate Court considers what particular point, or question the County Court has decided, and determines accordingly, whether it is correct or erroneous, and not whether the reasons assigned by the counsel on the record justifies what has been done. *Ib.*
 12. So where the admissibility of the testimony adduced, being objected to, whether it was admissible or not for the reason assigned, is wholly immaterial; this Court regards as the point decided below, the competency or incompetency of the evidence. *Ib.*
 13. To justify the reversal of a Court's judgment, on the ground of their having given an erroneous instruction to the jury, it must appear that the appellant actually, or probably, did sustain an injury thereby. If it did him no prejudice, no matter how erroneous, it forms no ground for reversal. *Bosley vs. Chesapeake Ins. Co.* 279.
 14. Where the Court of Appeals is of opinion that a bill dismissed generally by the Chancellor, should have been dismissed without prejudice, the practice is to reverse the decree of the Chancellor, and pass a new decree. *Stewart vs. Stone*, 318.

See EQUITY, 9, 22.

EXECUTORS AND ADMINISTRATORS, 2.

MALICIOUS PROSECUTION, 8.

ASSIGNMENT.

1. The blank endorsement and delivery of a bond invests the holder with the right of collecting, or suing for, in the name of the assignor, the money due upon such bond; and of appropriating the same to his own use. It is *prima facie* evidence of title to such bond in the assignee, and he may write a formal assignment over the assignor's signature. *McNulty vs. Cooper*, 185.
2. The Courts will not lend themselves to a donee or assignee, to enforce an inchoate contract, not founded upon a valuable considera-

ASSIGNMENT.—*Continued.*

tion; neither will they lend their aid to a donor or assignor, in a case where the gift or assignment has been consummated by possession, to recover back what the donee or assignee has received or collected. *Ib.*

See EQUITY, 16.

ASSUMPSIT.

In an action of assumpsit brought by W. & Co. to recover a portion of the instalments mentioned in the following agreement, dated 1st Dec. 1818, viz: "We the subscribers, promise to pay unto W. & Co. the sum we may subscribe as a payment for the steamboat S. in three equal instalments, viz. &c. It is hereby understood, that we, W. & Co. bind ourselves to appropriate the money subscribed in no other manner, but for the payment and use of said boat, and that each subscriber will hold an interest in proportion to the shares he may take. We, W. & Co. bind ourselves to run said boat from B. &c. and use every possible exertion in our power to the interest of the said boat. The shares will be divided into 280, of \$100 each." It appeared that 51 shares of the stock had been subscribed for, of which the defendants had taken five. *Held*, 1. That it was not to be implied from the terms of this agreement, that W. & Co. were the owners of the steamboat. 2. That the signing of this contract was an imperfect act, of no legal obligation until the whole number of shares should be subscribed; and until that was done W. & Co. were under no obligation to perform their part of the agreement. 3. That W. & Co. boat, after the signing of the agreement and before the bringing of the action, the consideration for the promise of paying the instalments contained in the agreement had failed, and therefore the action could not be sustained. 4. That upon the issue joined in this case, the defendant could not show that at a meeting called by W. & Co. of the subscribers thereto, it was determined by them not to pay the subscriptions, upon the ground that W. & Co. had failed in their part of the engagement. *Sothoron vs. Weems*, 269.

See CONFLICT OF LAWS, 2.

PROMISSORY NOTES, 1.

ATTACHMENT.

In attachment causes, as against the garnishee, according to our practice, the short note filed at the time of issuing the attachment, is substituted for a declaration. *Trasher vs. Everhart*, 145.

See LAW AND FACT, 4.

BAIL.

It has long been the established practice of our Courts, upon the production, of a release of the principal under the insolvent laws of another State, by the special bail, to enter an exoneration of the bail. *Richmond vs. De Young*, 41.

See EVIDENCE, 3.

BANKRUPTCY AND INSOLVENCY.

1. The Commissioners of insolvent debtors for the City and County of Baltimore, after having appointed a permanent trustee, and certified to Baltimore County Court, that the debtor hath not complied with

BANKRUPTCY AND INSOLVENCY.—*Continued.*

the terms and conditions of the insolvent laws, may, upon the neglect of such trustee to give bond within a reasonable time, appoint a new permanent trustee. *Glasgow vs. Sands*, 59.

2. The *choses in action* of a deceased wife, vest in the trustee of her surviving husband, on his application for a discharge under the insolvent laws, although the husband is reported against, and does not obtain a final release. *Ib.*
3. In an action by the permanent trustee of an insolvent debtor, under the system for the City and County of Baltimore, it is not necessary to produce an assignment from the provisional trustee to him, of the insolvent's effects, nor to show that a majority of the insolvent's creditors recommended him to the commissioners of insolvent debtors as permanent trustee, to support his right to sue in that character. *Per HARFORD COUNTY COURT. Kolb vs. Whitely*, 121.

See BAIL.

EVIDENCE, 7.

TRUSTS AND TRUSTEES, 6.

BILLS OF EXCHANGE.

See PROMISSORY NOTES, 5, 6.

BOND.

1. When a suit is brought on a private bond, &c. for the use of an individual, such person is not the legal plaintiff. The use is only entered for the protection of his equitable interest. If the *c. q. u.* dies pending the suit, his death is not the subject of a plea; nor is there for the purposes of the suit, any necessity for suggesting his death. The suit goes on as if he was still living or the use had never been entered. There is no reason why in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference. *State vs. Dorsey*, 47.
2. So where a Levy Court was abolished pending a suit brought in the name of the State, for the use of such Levy Court, against the obligors in a collector's bond, it was held, that a plea in abatement *puis darrein continuance*, that the Levy Court had been extinguished, was no objection to the further prosecution of the action. *Ib.*
3. In an action of debt on a bond with a collateral condition, where the defendant has pleaded general performance, and the plaintiff replied assigning a breach of the condition, it is a departure for the defendant to allege in his rejoinder, matter which shows the bond never had any legal existence. *Ib.*
4. It is a sufficient breach of the condition of a collector's bond, taken in pursuance of the Acts of 1794, ch. 53, and 1817, ch. 142, that the collector did not finish and complete the collections of the assessment or rate imposed, &c. placed in his hands and accepted by him for collection, within one year and six months after the delivery to him of the copy of the account of assessment, and list of taxables required to be delivered to each collector. *Ib.*

See ACTION, 2, 3, 4, 5, 6.

ASSIGNMENT, 1.

COURT, 2.

EQUITY, 11, 14, 15.

GUARDIAN AND WARD, 1, 2, 6.

BOND.—Continued.

See LIMITATIONS, 4.
REPLEVIN.

SEAL.

TAX AND TAX COLLECTOR, 2.

CASE, ACTION ON THE.

See MALICIOUS PROSECUTION, 1, 2.

CONDITION.

See EQUITY, 18.

CONFLICT OF LAWS.

1. It is an universal principle, governing the tribunals of all civilized nations, that the *lex loci contractus* controls the nature, construction, and validity of the contract. The exceptions are, where it would be dangerous, against public policy, or of immoral tendency, to enforce that construction here. *Trasher vs. Everhart*, 145.
2. The *lex loci contractus*, is never looked to, to determine the remedy which should be used, and the process to be issued, to enforce a contract. These are determined by the *lex fori*. So an action of assumpsit cannot be maintained here, upon a single bill made in Virginia, which, according to the laws of that State, is not a specialty, but according to our law, is. *Ib.*

See LAW AND FACT, 2, 3.

CONTRACT.

1. Where it was held, upon the construction of a contract, that a certain engagement therein made was an independent covenant. *Finley vs. Boehme*, 80.
2. In an action upon a contract under seal, where the declaration assigns and relies upon specific breaches, on which the issues are made up, the Court will not consider whether the plaintiff has delivered the articles for which he claims compensation within the time limited by the contract, if that inquiry is not necessarily involved in the issues as joined, nor determine the effect of such an omission upon the rights of the parties. *Ib.*
3. The plea of general performance, when relied on as an answer to a specific breach assigned in a declaration in covenant, must either be regarded as a nullity or as putting in issue the acts of commission or omission imputed to the defendant as violations of his contract. *Ib.*

See ASSUMPSIT.

CONFLICT OF LAWS, 1.

GUARDIAN AND WARD, 5.

INFANT.

LOTTERY, 2.

STATUTE OF FRAUDS.

CORPORATION.

See LEVY COURT, 2.

COSTS.

Since the passage of the Act of 1785, ch. 72, sec. 25, the practice of the Court of Chancery in England, in the case of a plea ruled to be sufficient, when set down for argument, to make the complainant

COSTS.—*Continued.*

pay £5 costs, is repealed, and a fine should be paid only by the party pleading or demurring, whose plea or demurrer is overruled. *Carroll vs. Waring*, 304.

COURT.

1. The judgment of a Court of competent jurisdiction, is, as to all matters decided by it, conclusive; and cannot be afterwards questioned by any other tribunal, when coming in incidentally. *Fridge vs. State*, 64.
2. So the appointment by the Orphans' Court, of a person as guardian, who at the time was one of the Judges of the Court, cannot be afterwards questioned in an action upon his bond, though at the moment of the appointment, the Court could not have acted without the concurrence of the individual appointed. *Ib.*

COVENANT.

See **CONTRACT**, 1, 3.

CRIMINAL LAW.

1. In an indictment for an assault with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent. *State vs. Dent*, 6.
2. The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence for the jury to demonstrate the intent, and not necessary to be incorporated in an indictment. *Ib.*
3. It is sufficiently certain in an indictment to describe an article stolen as "one hide of the value," &c. *State vs. Dowell*, 188.

DAMAGES.

See **REPLEVIN**, 1.

DEBTOR AND CREDITOR.

1. An offer to pay only a part of a sum due, cannot avail a party as a tender. A creditor is under no obligation to accept less than the full amount due him. *Fridge vs. State*, 64.
2. Absolute judgments at law obtained by a creditor of a deceased against his executor or administrator, amount to an admission of assets, and cannot be resisted on the ground of a deficiency of assets; but as between a creditor and the heir-at-law, in a proceeding to subject the real estate to the payment of his debt, such a judgment is not conclusive, but the creditor may show a deficiency of assets. *Gaither vs. Welch*, 161.
3. An administrator, who has confessed judgment, and thus admitted assets, being a creditor himself, may, as against the heirs of his intestate, for the purpose of subjecting the real estate to his claim, show that in fact the assets are not sufficient to pay all the creditors. *Ib.*
4. A judgment against an executor or administrator, does not furnish any evidence of the original debt, against the heir-at-law, in a proceeding to sell the real estate for the payment of debts, on the ground of a deficiency of assets. *Ib.*
5. Where the proceeds of a deceased's real estate are in the Court of Chancery, and a creditor wishes to subject that fund to the payment of his debt, upon the ground of a deficiency of assets, he is

DEBTOR AND CREDITOR.—*Continued.*

not called upon, in the first instance, to exhibit full proof of his claim. That may be done under the order *nisi* on the heirs-at-law. *Ib.*

See EQUITY, 1, 3, 5.

EXECUTION, 4, 5.

LIMITATIONS, 1.

DEED.

It is the office and operation of a deed of confirmation, to corroborate and give legal effect to a voidable, and not a void estate. It cannot work upon an estate void at law. *Blessing vs. House*, 178.

• See DESCENT AND DISTRIBUTION, 1.

EJECTMENT.

DESCENT AND DISTRIBUTION.

1. In an action by S. a distributee of W. against L. his administrator, upon the administration bond, to recover a distributive share of W's estate, it appeared, that W. on the 22nd October, 1810, conveyed sundry tracts of land and negroes to F. in consideration of \$1,000, paid by F.; and that F. by a deed dated a few days after, and reciting the previous deed, and declaring that it was in trust, conveyed the same property to R. in trust for W. for life, then in trust for the wife of W. &c. The negroes were also distributed among the same parties. L. the administrator, was another son. The trust estate was not brought into hotch-pot. *Held*, that these deeds were to be considered as one instrument, and afford ample proof, that S. was advanced by the intestate in his life-time. No valuable consideration moved from S. and as respects her, the deeds were voluntary and gratuitous; but that this was no bar at law, to this action. *State vs. Jameson*, 274.
2. It is not every child that is advanced, the law excludes from distribution. It is only such as are advanced by a portion, equal or superior to a share. To make a full defence at law, under the Act of 1798, ch. 101, sub-ch. 11, sec. 6, the defendant must show to the jury, the value of the plaintiff's advanced portion, and that it was equal to his distributive share. *Ib.*

See WILLS, 1.

DEVISEE.

See EQUITY, 1, 2.

DOWER.

1. H. in 1789, and in consideration that his mother would pay him £100 over his part of his father's personal estate, and all the debts due from her deceased husband, and also procure H. a conveyance in fee of certain lands, agreed with her, as a provision for the younger children of the family. to convey to her or her heirs, or to such of the younger children and their heirs, as she should from time to time appoint, certain other lands of which he was seised. A few days after this, H. married. Upon a bill filed in 1826, by his widow for dower, it appeared, that the mother in 1789, went into the possession of the land which H. had agreed to convey—that in 1807, H. uniting with his mother, executed deeds for this land to the defendants, and that the deeds with the agreement were put on record at the

DOWER.—*Continued.*

- same time—*Held*, that it appeared that the mother had complied with her part of the agreement, and was entitled to the conveyances from H. clear of any claim for dower on the part of his widow. *Cowman vs. Hall*, 245.
2. A widow is not dowerable in equity of lands which were held by her husband in the character of trustee. *Ib.*
 3. Where a bill for dower alleged that the complainant's marriage with her deceased husband took place "on or about the year seventeen hundred and —," and called upon the defendant to answer whether "she was not married as stated." And the answer after setting out an agreement of the 14th January, 1789, alleged that "the marriage took place some time after that agreement," it was *held*, that this allegation, both as respects the fact and time of marriage, was responsive to the bill, and must stand as conclusive of those facts, not being contradicted by any evidence. *Ib.*

EJECTMENT.

1. Where it was *held*, in an action of ejectment where defence was taken on warrant, and plots were returned, that a certain deed was void for uncertainty—could not be read because not located, and that a certain other deed could not operate as a confirmation of the first. *Blessing vs. House*, 178.
2. No title paper in an ejectment, where defence is taken on warrant, can be read in evidence, unless it is located. *Ib.*
3. In 1818, the tenant in possession failing to appear after notice, to an action of ejectment, judgment was rendered against the casual ejector. The plaintiff was then put into possession, under a writ of *habere facias* regularly executed. In 1827, C. claiming title to the land, by petition, in which the tenant in possession united, prayed the County Court to set aside the judgment, restore the possession, and admit the petitioners to defend the action, upon the usual terms: this being granted, the defendants afterwards moved the Court, to stay all proceedings, upon payment to the lessor, the rent due to him at the time of bringing the suit and the costs. This motion being also granted, the plaintiff appealed. *Held*, that the County Court erred in striking out the judgment, which was entered upon the tenant's failing to appear, after such a lapse of time, and that the lessor of the plaintiff was entitled to a writ of restitution. *Klinefelter vs. Carey*, 210.
4. Wherever a judgment in ejectment has been stricken out upon the tenant's failure to appear, it has always been one of recent date. It has generally been, where the period had been too short for improvements of importance to have been made in the intermediate time, and where no trial had been lost. *Ib.*

See GRANT. 2.

EQUITY.

1. The bar, arising from the Act of Limitations, relied upon in the answer of one co-defendant to a bill in Chancery, brought by a creditor against devisees, to recover his claim out of the real estate of a deceased debtor, upon the ground that the personal estate had been exhausted in the payment of debts, will not enure to the

EQUITY.—*Continued.*

- benefit of the other co-defendants, and authorize the Chancellor to dismiss the bill. *McCormick vs. Gibson*, 10.
2. Upon a bill of this description, where the devisees have received distinct parcels of property, the interests of the defendants are several and distinct. The claim against each being in proportion to the amount devised to him. *Ib.*
 3. According to the principles of equitable jurisprudence, the personal estate is the natural fund for the payment of debts and legacies, and generally speaking, is first to be exhausted, before resort can be had to real property. *Hoye vs. Brewer*, 96.
 4. Where a testator charges both his real and personal estate with the payment of debts and legacies, and a purchaser of the real estate desires to have his bonds given for the purchase money, applied to release his purchase from the charge in the will, it should regularly appear upon the face of his bill, that the whole personalty had been applied towards the payment of debts and legacies. That must appear before a Court of equity could decree the land to be liable for such purpose, and ought to be expressly averred. *Ib.*
 5. That averment is so essential, that where it ought to have been made, and was not, although it was stated in the decree passed by the County Court, that the solicitors of the defendants admitted the whole of the personal estate to have been applied towards the payment of debts and legacies, yet as a party must always obtain redress according to his allegations and proofs, the Appellate Court reversed the decree containing that statement, but without prejudice. *Ib.*
 6. The policy of the law forbids that a trustee should become a purchaser, directly or indirectly, at his own sale; and if he does, such sale may, and will be set aside, on the proper and reasonable application of the parties interested. *Richardson vs. Jones*, 104.
 7. The rule, that a trustee shall not become a purchaser at his own sale of the trust property, was not adopted in favor of trustees, but for the protection of the interest of the *cestui que trust*. *Ib.*
 8. Chancery will not interpose and set aside a sale made by a trustee, to himself, or his agent, either upon the application of the trustee or the agent. *Ib.*
 9. An order requiring the principal obligor, and the sureties in a bond, given for the purchase money of land sold by a trustee of the Court of Chancery, to pay such purchase money to the trustee, or bring it into Court, or show cause to the contrary by a given day, is purely interlocutory, settles nothing between the parties, and is not the subject of an appeal. *Ib.*
 10. Where a sale is made under a decree, or order in Chancery, and no bond or security is given for the payment of the purchase money, the purchaser may be compelled to complete his purchase, by an order on him in a summary way, to pay or bring the money into Court. *Ib.*
 11. But when a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring a bond to be given, and the sale has been ratified, the purchaser and his sureties cannot be compelled to pay the bond in a summary way, by an order from Chancery. This constitutes a legal contract to be enforced at law.

EQUITY.—*Continued.*

12. No action at law will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. That Court enforces its own decrees. *Ib.*
13. An order of the Court of Chancery, ratifying a trustee's sale where no bond has been given, or the sale is for cash, is considered as amounting to a decree for the payment of the purchase money, and if that Court could not enforce the execution of it, it could not be enforced at all. The trustee cannot, before ratification, which is the completion of the contract, claim to enforce it in equity, nor after ratification can he sue upon it at law. *Ib.*
14. Where a bond has been given in conformity to the order of sale, the ratification is an adoption of the bond only. *Ib.*
15. Where a purchaser at a trustee's sale gave his bond in conformity with the orders of sale, but afterwards, by fraud, defeated the action at law brought upon his bond, he may still be made responsible in equity for the purchase money, upon a bill shewing his improper conduct, though in the meanwhile limitations may have barred the bond at law. *Ib.*
16. S. gave his note, payable 50 days after the drawing of a lottery should be completed, "in cash, or prize tickets in said lottery," and secured the same by a mortgage. The mortgagee, two years after the drawing, assigned the mortgage. The tickets in the lottery certified that the holder thereof would "be entitled to such prize as may be drawn to its number, if demanded within 12 months after the completion of the drawing, subject to a deduction of 15 per cent. payable 60 days after conclusion." Upon a bill filed some years after the assignment, to sell the mortgaged premises for payment of a balance due upon the note, it was *held*, that prize tickets which had not been presented to the managers of the lottery for payment, within the 12 months, could not be set-off against the complainant's claim. *City Bank, &c. vs. Smith*, 165.
17. The prize tickets stipulated to be received in payment of the note, were intended to be available tickets, upon which the holders would be entitled to demand and receive, the prizes drawn to their respective numbers. They were those on which the prizes had been demanded within 12 months from the completion of the drawing, or on which the holder was entitled to demand the prizes, 12 months not having elapsed from the time of the drawing. *Ib.*
18. Equity will relieve against penalties and forfeitures, where the matter lies in compensation, whether the condition on which they depend, be precedent or subsequent. But notwithstanding it will in many cases interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate, by giving an estate that never vested, and that by reason of the non-performance of a condition precedent, will not vest in law. *Ib.*
19. Where it was *held*, that D., who, in 1815, voluntarily assumed a trust over certain real property, to a part of the rents of which the complainants were entitled, and from that period until 1828, from time to time, every year, received large sums of money from the estate, which he continually employed in trade and speculation, was liable

EQUITY.—*Continued.*

- to pay compound interest, estimated on the balance in his hands at the end of each year; and that having kept full and fair accounts of his receipts and expenditures, and in that respect faithfully discharged his duty as trustee, he had not forfeited all claim to commissions, but was entitled to half commission—5 per centum. *Defender vs. Winder*, 189.
20. Accounts stated by the auditor of the Court of Chancery which have not been confirmed by the Chancellor, are no evidence of the truth of the facts assumed by the auditor in stating them. *Ib.*
21. An answer flatly denying an allegation in a bill, can only be overruled by the positive testimony of two witnesses, or of one aided by pregnant circumstances—such circumstances standing alone, without the aid of positive testimony, will not destroy the effect of an answer. *Roberts vs. Salisbury*, 263.
22. Upon a bill to record a mortgage against subsequent purchasers charged with notice, the Chancellor, when the case stood ready for hearing, said in his remarks preparatory to the order appealed from, “I am satisfied that the defendants must be considered as purchasers with full notice of the vendor’s (the complainant’s) lien, and of the mortgage which had been given to secure the payment of the purchase money, and that under the one or the other the land was bound,” but passed no order directing the mortgage to be recorded. The order passed in the cause, only referred the case to the auditor, with the usual directions to receive further proof, and state an account. *Held*, that nothing had been done conclusive upon either the Chancellor or the parties—no question of right had been settled, and that an appeal would not lie at that stage of the cause. *Ib.*
23. When property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case. *Carroll vs. Lee*, 318.
24. So, where the defendant is within the State, and the land, or other property in contest, is beyond its limits, although the proceeding is *in rem*, the Court of Chancery has jurisdiction. To enforce a decree in such a case, the proceeding may be *in personam*, as well as by injunction, to recover the possession of the thing disputed. *Ib.*
25. Where the property has been removed from the State, and the defendant resides out of its limits, his appearance to the suit, and answer to the bill, for the purpose of contesting the merits, is waiver to any objection to the jurisdiction of the Court, although in his answer he also excepts to it. *Ib.*

See ACTION.

APPEAL AND ERROR, 6, 7.

DOWER, 2, 3.

EXECUTORS AND ADMINISTRATORS, 6.

PLEADING, 5, 6, 7.

STATUTE OF FRAUDS, 2.

TRUSTS AND TRUSTEES. 1. 3. 4.

ESTATES-TAIL.

See WILLS, 1.

EVIDENCE.

1. The securities on an administration bond, in a suit brought by a distributee against the administrator, are not competent witnesses to prove, that the assets of the deceased have been consumed in the payment of debts. *Owens vs. Collinson*, 19.
2. It is not true as a uniform rule, that a creditor is a competent witness for administrators. He is only so, where the assets are sufficient for the payment of debts. When they are not, whether the administrator be plaintiff or defendant, if the verdict swells the fund to which he must look for the payment of his debts his incompetency is manifest; he is only competent when the verdict cannot affect his interest. *Ib.*
3. The bail of the defendant is not a competent witness for him. *Ib.*
4. In an action upon an administration bond against a surety, the administrator is not a competent witness for the defendant. The witness is responsible for costs, in case of a recovery against the defendant. *Ib.*
5. Accounts settled in the Orphans' Court, by executors, administrators and guardians, are *prima facie* evidence in all suits touching the matters therein contained, to which they are parties; and the *onus probandi* rests on him who seeks to impeach their correctness. *Ib.*
6. Upon a bill against an alleged intruder for an account of the rents and profits of the complainant's estate, accruing during her minority, her guardian is not a competent witness to prove an agreement between himself and the defendant, that the defendant should keep the estate, and pay the rents to the complainant and her sister, who were jointly interested. It was the duty of the witness to have collected the rents, and accounted for them. He is therefore interested in sustaining the suit. *Hungerford vs. Bourne*, 85.
7. Where A. and B. who were partners in trade, became embarrassed about the 17th March, and on the 27th applied for a discharge under the insolvent laws, and where, as between the permanent trustee of the insolvents and the defendants, the inquiry was, whether a certain transfer of property made by the insolvents, on the 19th, to the defendant, then a creditor, was made with a view, or under an expectation of being or becoming insolvent debtors, it was *held*, that for the purpose of enabling the jury to find when the intent to seek relief under the insolvent laws originated, certain declarations of one of the insolvent partners, made a few days before the 20th, and certain entries in the day book of the insolvents, were competent evidence for that object, as surrounding circumstances of the transaction, and a part of the *res gestæ*. *Kolb vs. Whitely*, 121.
8. When declarations of persons, not parties, to a suit, constitute a part of the transaction under investigation, they are admitted in evidence to show its character, or the speaker's intention. *Ib.*
9. The current of decision in modern times, both in England and the United States, has set against all objection to the admissibility of a witness, unless his interest be a legal interest. There is no other safe standard of exclusion than a legal interest. *Stimmel vs. Underwood*, 174.
10. It is no objection to the competency of a witness, that he had been heard to say some months before the trial, he felt himself bound to

EVIDENCE.—*Continued.*

- pay the plaintiff the amount of the controversy, if the plaintiff did not recover, the witness having been since released by the plaintiff. *Ib.*
11. A mistaken belief, or an honorary obligation, on the part of a witness, that he is bound, or ought to pay the plaintiff's claim, in case he should not recover in the action, does not render the witness incompetent. *Ib.*
 12. Evidence of unsworn declarations of a witness is inadmissible to impeach his competency. *Ib.*
 13. The undertaking of a security for costs upon the record may be stricken out, and a new and sufficient security, in the discretion of the Court, substituted, to make the first security a witness for the plaintiff. *Per FREDERICK COUNTY COURT. Ib.*
 14. In an action of a replevin for a negro slave, the plaintiff proposed to prove by his former guardian, that the negro in controversy was the plaintiff's property; but it appearing, that this negro constituted a part of the plaintiff's estate during his minority, and during one period thereof had been in the witness' possession, the County Court held the witness incompetent. Upon appeal this was reversed. *Watts vs. Garrett, 214.*
 15. When the competency of a witness is objected to on the ground of interest, the interest should appear. It should be seen by the Court, in order that it may be able to determine its character, and whether it be such as to amount to a disqualification. It should not rest in mere conjecture or speculation, but should be certain and direct, and not possible only. *Ib.*
 16. Where the interest is of a doubtful character, the objection goes to the credit, and not the competency of the witness. *Ib.*
 17. Evidence offered to the jury for a particular purpose, may be properly rejected, though it might be admissible for some other object in the same cause. *Sothoron vs. Weems, 269.*
 18. It is an established principle of evidence, that the answer of one defendant cannot be received in evidence against a co-defendant. If the complainant wishes to establish a fact, by the evidence of a co-defendant, he may be examined as a witness on interrogatories, which will afford the other defendant an opportunity to cross-examine him. *Stewart vs. Stone, 818.*
- See **APPEAL AND ERROR**, 5, 12, 14.

ASSUMPSIT.**CRIMINAL LAW**, 2.**DEBTOR AND CREDITOR**, 2, 4.**DESCENT AND DISTRIBUTION**, 1, 2.**DOWER**, 3.**EJECTMENT**, 1, 2.**EQUITY**, 20, 21.**EXECUTION**, 6.**GUARDIAN AND WARD**, 7.**LAW AND FACT**, 1, 2, 3, 4.**MALICIOUS PROSECUTION**, 4, 5.**PROMISSORY NOTES**, 4.**TRUSTS AND TRUSTEES**, 7.**USURY**, 1.

EXECUTION.

1. It is a general principle, that where a new person is to be benefited, or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party; but this principle does not apply to a case, where the new party becomes interested after the process is in the hands of the officer for execution. *Hanson vs. Barnes*, 217.
2. The death of a defendant before a levy on a *fi. fa.* in the hands of the sheriff prior to such death, does not render a *sci. fa.* against the heirs and *terre tenants* necessary; the sale under a *fi. fa.* thus issued and levied, passes title to the purchaser. *Ib.*
3. The writ of *fi. fa.* requires no order or action of the Court, to give the plaintiff the fruits of his execution. These are reaped when the sheriff discharges his duty under the process. *Ib.*
4. Since the Statute of 5 Geo. 2, chap. 7, lands have not been considered as a secondary fund in the hands of the debtor for the payment of debts; but they are equally liable with his personalty. The judgment creditor may, at his election, seize either, unless under peculiar circumstances of equity, he shall be restrained from exercising his election to the prejudice of an alienee, devisee, or heir. *Ib.*
5. After the death of a debtor, lands are only secondarily liable, but this must be taken with the qualification, that prior to his death, they had not become liable to be affected by an execution. *Ib.*
6. Parol evidence is admissible to establish the date of the delivery of an execution to the sheriff, where no endorsement of the time was made on the writ, as the statute demands of that officer. *Ib.*
7. Neither an endorsement of the time of the delivery of a writ of *fi. fa.* to the sheriff, nor evidence of that fact, is necessary in making title to lands purchased under that writ—Nor is it necessary as to personal property, except as against purchasers. *Ib.*
8. Where goods taken under a *fi. fa.* have been sold for a part of the amount due on the judgment, a *ca. sa.* cannot be legally issued for the residue, until the sheriff has made a final return of the *fi. fa.* showing what has been done with the property. This return should be in term time; if made in the recess to the clerk's office, it is void. The same principles apply to a *venditioni exponas*. *Turner vs. Walker*, 280.
9. In March, 1825, a writ of *fi. fa.* was sued out, which the sheriff returned at the return day. In July, a *vendi.* issued founded upon that return; this being returned and not executed, another *vendi.* was issued, which was returned to April Term, 1827, executed, and the proceeds of the property sold, paid to plaintiff's attorney. At April Term, 1828, the defendant in the execution, moved to quash the last *vendi.* and the return thereto, for various alleged irregularities. *Held*, that the motion not being made at the return term of the writ, nor while the proceedings were *in fieri*, was too late. *Waters vs. Peach*, 251.

See MALICIOUS PROSECUTION, 7.

EXECUTORS AND ADMINISTRATORS.

1. The allowance for commissions made to a collector under letters *ad colligendum*, granted upon a deceased person's estate, ought to have no effect upon the commissions of the executor or administrator of

EXECUTORS AND ADMINISTRATORS.—*Continued.*

- the same estate. They are distinct and independent allowances for different services. *Wilson vs. Wilson*, 15.
2. **The** law having fixed a *minimum* and a *maximum* rate of commission to be allowed to executors or administrators, and vested a discretion in the Orphans' Court restricted only by those limits, an allowance by that Court, of commissions within those rates, is not to be reviewed here. This Court has no power to disturb such a decision. *Ib.*
 3. **Interest** is not to be charged on money retained by an administrator with the sanction of the Orphans' Court and consent of parties, to meet the future contingencies of the estate. *Ib.*
 4. **An** administrator, who, being called upon in Chancery to account, comes promptly into Court, answers the bill, and submits all his accounts and vouchers, and furnishes the means of detecting the errors which are fairly attributable to him, is not to be presumed guilty of a fraudulent concealment of credits actually omitted. *Owens vs. Collinson*, 19.
 5. **If** an executor or administrator, *bona fide*, without any knowledge of its injustice, pay a claim previously passed by the Orphans' Court, though not proved in the manner prescribed by the testamentary system, such payment is not made at his risk. To a credit therefor, he is not only *prima facie* entitled, but his right to it cannot be controverted. So if he retain the amount of his own claim thus passed. *Ib.*
 6. **When** the accounts of an executor are under an examination in Chancery, if it should appear on the face of vouchers passed by the Orphans' Court that a claim paid, was not a just one against the deceased, it is as much the duty of a Court of equity to reject it, as if the illegality of its allowance were established by proof *de hors*. *Ib.*
 7. **I.** as executor of E. claimed an allowance for the payment of a note signed I. and E. which was admitted by the Orphans' Court; I. passed his account accordingly, and was credited for the whole amount. This account being under investigation in Chancery, and it being admitted that the signature I. and E. was in E's hand-writing, in the absence of proof of partnership between them: *Held*, that the *prima facie* character of the account was not impeached. *Ib.*
 8. **An** action may be maintained by a creditor of a testator, against the executor of his executor, suggesting a *devastavit* by the first executor of the goods of his testator. *Sibley vs. Williams*, 37.
 9. **Under** the Act of 1798, ch. 101, sub-ch. 14, sec. 2, it is clear that the Legislature did not mean to make any thing, the subject of administration in the hands of the administrator, *d. b. n.* which did not exist in specie. The Act of 1820, ch. 174, sec. 3, extended such an administration, to bonds, notes, accounts and evidences of debt, which a deceased executor or administrator may have taken, received, or had in that character, and to money in his hands, and gives power to the administrator *d. b. n.* to recover the same by an action on the bond. *Ib.*

EXECUTORS AND ADMINISTRATORS.—*Continued.*

See DEBTOR AND CREDITOR, 2, 3, 4.

EVIDENCE, 1, 2, 4, 5.

GUARDIAN AND WARD, 7.

FORGERY.

1. Where it was *held*, in an action of slander in which it appeared that the defendant had charged the plaintiff with having forged a certain instrument, that it was the subject of forgery at common law, and sustained the action. *Arnold vs. Cost*, 138.
2. It is not now held to be essential to the offence of forgery, in any case, that some one must have been injured. It is sufficient, if the instrument forged, supposing it to be genuine, might have been prejudicial. The question whether a particular instrument is capable of supporting a charge of forgery, is referrible not to the form, but to the substance of it. *Ib.*

FRAUD.

See EQUITY, 15.

GIFT.

See HUSBAND AND WIFE, 3, 4.

GRANT.

1. The construction of a grant is for the Court, and not a matter proper to be submitted to a jury, except in a case of latent ambiguity. *Thomas vs. Godfrey*, 89.
2. It is a well established rule of construction, that calls, whether to artificial or natural objects, are to be preferred to courses and distances; therefore, when a tract of land is described by courses and distances, and calls, the calls are to be gratified in the construction of the grant, if they can be established, and the courses and distances disregarded, if they do not correspond with the calls. *Ib.*

GUARDIAN AND WARD.

1. In an action upon a bond entered into by a guardian appointed by the Orphans' Court, brought for the use of the ward, the mere fact that at the time of the guardian's appointment, a natural guardian was in existence, does not invalidate the appointment and so render the bond a nullity. That Court having jurisdiction to appoint a guardian in certain cases, even where there is a natural guardian, must be presumed to have acted rightly, when the question of the validity of the appointment arises incidentally, and nothing more than the existence of natural guardian appears. *Fridge vs. State*, 64.
2. Where the condition of a bond recited that A. was guardian, &c. neither the principal obligor nor a surety therein, in an action upon such bond, can deny that he was guardian in the face of the recital, nor set up as a defence any supposed irregularity in obtaining the appointment. *Ib.*
3. A female, under the age of 21, cannot execute a release to her guardian, though she has capacity to receive payments from him at the age of 16—A release, which affords more protection to a guardian than a mere receipt, is in its nature and tendency to the prejudice of the infant, and opposed to sound policy. *Ib.*
4. The promissory note of a guardian given to an infant female ward over the age of 16 years, is no payment. *Ib.*

GUARDIAN AND WARD.—*Continued.*

5. **It is the duty of a guardian to a female ward, on her arrival at the age of 16 years, to exhibit a final account to the Orphans' Court, and to deliver to the ward all her property in his hands. So far as the property of a ward in the guardian's hands consists of money, this constitutes a contract to pay money when she attained the age of 16, which is a day sufficiently certain in case of failure to pay, to entitle the ward to interest absolutely.** *Ib.*
6. **In an action in the name of the State, the obligee in a guardian's bond, the non-age of the *cestui que use*, the ward, who was more than 16, is no defence, and does not form the fit subject of a plea.** *Ib.*
7. **The inventory of a deceased testator's estate, and the accounts thereof, as filed in the Orphans' Court by his executor, are admissible evidence in an action of assumpsit, brought by a child of the deceased, against the executrix of such executor; the latter having been the guardian of the child, and the object of the suit being to recover property of the ward, which he as guardian, was charged with having converted to his own use, and assumed to pay upon the liability resulting from the conversion.** *Green vs. Johnson, 288.*
8. **To such an action, the Act of Limitations is a bar, after the lapse of time required by its provisions, there being no evidence to rebut it.** *Ib.*

See ACCOUNT, 1.
COURT, 2.
EVIDENCE, 6, 14.

HUSBAND AND WIFE.

1. **A separate estate in a wife, in personal chattels, was unknown to the common law; like her person, her property was under the control of her husband.** *Carroll vs. Lee, 318.*
 2. **A separate property may now be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee.** *Ib.*
 3. **To exclude the marital rights over her property, a clear intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary, but adequate language must be employed in making a gift, to manifest a decided intention to transfer a separate interest.** *Ib.*
 4. **A gift of plate to a married woman, unexplained as to intention, is a gift, to which the marital rights instantly attach, and the thing given, immediately becomes the property of the husband.** *Ib.*
- See* BANKRUPTCY AND INSOLVENCY, 2.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

Some contracts made by infants are binding, such as contracts for necessities. Some are void; and others are voidable only, such as contracts that may be for the benefit of the infant. A contract that a Court can see and pronounce to be to the prejudice of the infant, is void. *Fridge vs. State, 64.*

See GUARDIAN AND WARD, 3, 4.

INSURANCE.

1. An insured is not compelled in any case to abandon. He has an election which rests in his discretion: but no right to claim for a technical or constructive total loss vests, until such election is made. *Bosley vs. Chesapeake Ins. Co.*, 279.
2. An election to abandon for a total loss cannot be made, until receipt of advice of the loss. *Ib.*
3. Intelligence of the loss of a ship derived from a newspaper, is sufficient advice to authorize an insured to abandon upon. *Ib.*
4. The information which is sufficient to authorize the assured, to give notice to the underwriter, that he abandons, must be of such facts and circumstances as would sustain the abandonment, if existing in point of fact, at the time the notice was given. *Ib.*
5. The mere stranding of a vessel, does not of itself, form a substantive ground of abandonment. The right to abandon on such an occurrence, depends on the attending circumstances. *Ib.*
6. Where it was held, that a certain letter from the assured to the underwriter, offering to abandon did not state a sufficient reason for said offer. A mere apprehension that a total loss may have taken place, does not authorize the offer. *Ib.*

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 3.
 GUARDIAN AND WARD, 5.
 LIMITATIONS, 4.

JUDGMENT.

See COURT, 1.
 EJECTMENT, 3, 4.

LAW AND FACT.

1. Upon a case stated, the Court can supply no fact by implication. *Hysinger vs. Baltzell*, 99.
2. It is in general true, that foreign laws are facts which are to be found by the jury; but this rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the Court to determine, whether a written instrument is evidence. In such case, the evidence always goes in the first instance, to the Court, which, if the evidence be clear and uncontradicted, may, and ought to decide, what the foreign law is, and act accordingly. *Trasher vs. Everhart*, 145.
3. If what the foreign law is, be matter of doubt, the Court may decline deciding it, and may inform the jury, that if they believe the foreign law attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence, if not, they should reject it. *Ib.*
4. In an attachment cause, upon a short note in assumpsit, the plaintiff proved a single bill of the debtor, as his cause of action, and proposed to prove to the jury, that the instrument of writing in question, was executed in Virginia, for the purpose of showing, that by the laws of that State, a single bill is not a specialty. The County Court permitted the evidence to go to the jury. *Held*, upon appeal that the evidence was for the Court exclusively. *Ib.*

LAW AND FACT.—*Continued.*

5. Where a variety of facts have been proved, a prayer making a partial enumeration of them, and thereupon asking an instruction to a jury, will not be granted, if not sustained by a consideration of all the facts proved, which belong to the question, whether enumerated or not. *Bosley vs. Chesapeake Ins. Co.*, 279.

See GRANT, 1.

MALICIOUS PROSECUTION, 3, 4.

TRESPASS QUARE CLAUSUM FREGIT, 2.

LEGACY.

See EQUITY, 3, 5.

LEVY COURT.

1. The Levy Court of Baltimore County, having omitted to make the levy for the year 1823, between the 1st of March and 31st of December of that year, as they were bound to do by the Act of 1817, ch. 22, were authorized by the Act of 1823, ch. 23, to "make and close the levy for the year 1823, on or before the 1st of March, 1824." *Held*, that as the collectors of the levy were not to be appointed before the assessment was made, the Act of 1823 carried with it an extension of the time for appointing those officers; or if it did not, their appointment under the Act of 1817 was not restricted, as the laying of the levy was, to the 31st December of the year for which the tax was levied. *State vs. Dorsey*, 47.
2. The Levy Court being a corporation, had power to accept and approve the bond of a collector appointed to collect the levy, authorized by the Act of 1823, though not executed and filed with them until the 2d of March, 1824. *Ib.*

See BOND, 2.

LIEN.

1. An implied lien for the purchase money of land where the vendor has parted with the legal title, will not be enforced against a subsequent purchaser, without notice. *Roberts vs. Salisbury*, 263.
2. The vendor of land who parted with the legal title, and took a mortgage of the same land from his vendee, which he neglected to record in due time, cannot enforce his mortgage against a subsequent purchaser from the vendee, without notice. *Ib.*

LIMITATIONS.

1. By the Act of November, 1765, ch. 12, it is declared, that if a person who is liable to an action, shall be out of the Province at the time the cause of action hath accrued, he shall have no benefit or advantage from the Act of 1715, ch. 23, (the Act of Limitations) provided, the person who has such cause of action shall prosecute the same, after the presence, in this Province, of the person liable thereto, within the time or times limited, in and by the said Act of 1715. *Held*, upon the construction of this Act:

(1.) That the Acts of 1715, ch. 23, and 1765, ch. 12, are to be taken together, and to receive a construction to carry into effect the plain and obvious intention of the Legislature, that limitations should not attach against a creditor, where the debtor was absent from the State, at the time the cause of action accrued.

LIMITATIONS.—*Continued.*

- (2.) That if at any time after the cause of action accrued, the debtor, by his presence in the State, afforded the creditor an opportunity to prosecute his writ with effect, he should institute his action within the time required by the Act of 1715, or his claim would be barred by limitation.
- (3.) To bring a case within the Act of 1765, the presence of the debtor within the State, must be such as to enable the creditor to avail himself of it; a secret, concealed, clandestine presence for any length of time, of which, the creditor could not take advantage, would not be sufficient. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, to arrest the debtor. *Hysinger vs. Baltzell*, 99.
2. Where a cause of action accrued in October, 1822, when the defendant was a resident of another State, and it appeared, upon a case stated, that the defendant was in Baltimore, where the plaintiff resided, in April, 1823, "purchased other goods from the plaintiff, and remained there for two days," it was *held*, that limitations did not then attach, because it did not appear at what time during those two days, the defendant made his purchase: nor whether the plaintiff had an opportunity to sue out a writ against him with effect. *Ib.*
3. Where it fully appears, upon the face of a complainant's bill, that there had been a sufficient lapse of time to make the bar created by the Act of Limitations, a defence to the suit, it is not necessary to verify the plea of limitations by an oath; nor is it necessary to support such a plea by an answer, where there was nothing charged in the bill in avoidance, or which could take the case out of the Statute of Limitations. *Carroll vs. Waring*, 304.
4. The payment of interest upon a bond, is no avoidance of the Act of Limitations, of this State, nor will even an express acknowledgment of the debt revive the remedy upon a bond barred by that Act. *Ib.*
- See ACCOUNT, 2.
EQUITY, 1, 15.
GUARDIAN AND WARD, 8.
TRUSTS AND TRUSTEES, 5.

LOTTERY.

1. The Act of 1821, ch. 232, was not designed to prevent the mere sale of lottery tickets, or to impose upon the seller the necessity of obtaining a license therefor. Its prohibitions only extend to the opening, setting up, exercising, or keeping any office or other place, for selling lottery tickets, or registering the numbers, or publishing the setting up, &c. without having first obtained a license for that purpose. *Yates vs. O'Neale*, 158.
2. A contract between A. and B. by which the latter agreed to become the agent of the former, for the sale of lottery tickets, account for, and remit a certain part of the sales of tickets, and bear the expenses of the agency, is not void under the Act of 1821. There is nothing in such a contract, upon any principle

LOTTERY.—*Continued.*

of construction applicable to penal statutes, that could warrant a jury in inferring that the agent had agreed to open an office, &c. of the character described in the Act; and the Court will not presume that A. intended to violate that law, by having an office kept without a license. *Ib.*

See **EQUITY**, 16, 17.

MALICIOUS PROSECUTION.

1. An action upon the case is the proper remedy against one who maliciously procures a *ca. sa.* to be issued, and another to be arrested under it. *Turner vs. Walker*, 230.†
2. The foundation of such an action is malice, and a want of probable cause, which must be proved. *Ib.*
3. The fact of malice always a question for the jury. *Ib.*
4. Malice may be, and most commonly is, in such actions, implied from the want of reasonable or probable cause, that being first established. But the presumption of malice resulting from the want of probable cause is not conclusive, and the defendant, for the purpose of rebutting the inference of malice, may be let in to show, for instance, that he acted under the advice of counsel. The effect of such evidence, is however, for the jury. *Ib.*
5. Evidence of the conduct and declarations of the defendant in relation to, and in the course of the transaction—of the situation of the parties—of the nature and extent of the injurious means resorted to by the defendant to effect his object, and of his forwardness, zeal and activity manifested in the procurement and use of the means employed, may properly be adduced to prove malice. *Ib.*
6. It is generally true, that in an action for a malicious prosecution, or a malicious arrest, malice—the want of probable cause, and also the determination of the prosecution, or of the suit in which the writ was sued out, must be averred and proved. *Ib.*
7. But where a *vendi.* was sued out, returnable to March, and the sheriff in fact executed that writ, and returned it to the clerk's office in December, and the plaintiff then sued out a *ca. sa.* which was also returnable to the same term, with the *vendi.* under which the defendant was arrested and imprisoned in December, the reason for averring in an action upon the case, the want of probable cause for the arrest, and the determination of the suit, does not exist, and a declaration showing the facts specially, in the absence of the ordinary averment, would be sufficient. *Ib.*
8. Where the plaintiff, who had obtained a verdict in an action for a malicious arrest, died pending an appeal, the Court, on reversing the judgment upon a bill of exceptions, refused a *procedendo.* *Ib.*

MORTGAGE.

See **EQUITY**, 22.

LIEN, 2.

NOTICE.

See **INSURANCE**, 4.

PROMISSORY NOTES. 3, 4, 6, 7.

ORPHANS' COURT.

The Orphans' Courts are the tribunals invested by law, with the power of passing claims against the estates of deceased persons. *Owens vs. Collinson*, 19.

See EXECUTORS AND ADMINISTRATORS, 2.

PAYMENT.

See GUARDIAN AND WARD, 4.

PLEADING.

1. Where Y. having sued out a writ in trespass upon the case against M. J. R. and S. and filed a declaration, counting upon their note as co-partners, and M. only having been arrested, a certain plea made by M. was held, upon special demurrer, to be a valid plea in abatement. *McLaughlin vs. DeYoung*, 4.
2. A plea in abatement of the writ, is one which shows ground for abating or quashing it, without at the same time denying the right of action itself; and if a plea begins in bar, though it contains matter in abatement, it will be treated as a plea in bar. *Ib.*
3. An informal or repugnant protestation does not on demurrer, vitiate a plea. *Ib.*
4. It is not upon the evidence, but upon the pleadings, as evidence applicable to the pleadings, that a plaintiff can recover in any case. *Turner vs. Walker*, 230.
5. A certain annuity left by a will being in arrear, the devisee entitled thereto filed her bill against the infant devisees of the land, their guardian, and the personal representative of the testator, alleging the annuity to be a charge on the land and its profits, and praying for an account—that the lands may be sold,—the proceeds applied to the payment of the annuity, so far as necessary, and the balance invested to meet future instalments, and for general relief. *Held*, that as the bill contained no allegation or suggestion of the receipt of the rents and profits by the defendants, or any of them, nor of the annual value of the land, nor of the application of the rents and profits, and did not call upon the defendants to make any disclosures upon these subjects, there was no issue, to which evidence, which had been taken in the cause in relation to them, could apply, and that there could be no decree *in personam* against the defendants, under this state of the pleadings. *Robinson vs. Townshend*, 254.
6. The neglect of a defendant to answer a bill, upon which a decree *pro confesso* is passed, amounts to an admission only of the allegations in the bill. *Ib.*
7. The answer of infant defendants, calling upon the complainants to prove the bill only puts them to the proof of what is charged, and entitles them only to a decree on the case made in the bill, when proved. *Ib.*

See APPEAL AND ERROR, 4.

ATTACHMENT.

BOND, 1, 2, 3.

CONTRACT, 2, 3.

COSTS.

DESCENT AND DISTRIBUTION, 2.

DOWER, 3.

PLEADING.—*Continued.*

See EQUITY, 4, 5, 21.

EVIDENCE, 5.

GUARDIAN AND WARD, 2, 6.

LIMITATIONS, 3.

MALICIOUS PROSECUTION, 6, 7.

PROMISSORY NOTES.

TRUSTS AND TRUSTEES, 2, 3, 6.

PRACTICE.

See APPEAL AND ERROR, 14.

ATTACHMENT.

BAIL.

BOND, 1.

DEBTOR AND CREDITOR, 5.

EXECUTION, 9.

PROMISSORY NOTES.

1. The endorsee of the payee of a negotiable note, can maintain an action on the money counts, against the maker of the note, upon the proof of the note and endorsement. *Penn vs. Flack*, 224.
2. Where the declaration averred that a negotiable note was endorsed, before it fell due, and it appeared upon the production of the note, that it was endorsed after maturity, this was held to be no material variance. *Ib.*
3. The promissory note of I. endorsed by G. and P. fell due at Washington, on the 6th, where payment was then demanded, and refused. The notices to the endorsers were enclosed in a letter addressed to P. at Baltimore, and mailed at Washington on the evening of the 6th. The mail left Washington every morning, and arrived at Baltimore at an early hour the same afternoon. Both the endorsers lived in Baltimore, and notice was delivered to G. the first endorser, on the 9th. *Held*, that G. was discharged from his liability as endorser, the notice being one day too late; in legal presumption the notice reached P. on the 7th. *Flack vs. Green*, 296.
4. After evidence had been given, that a letter containing two notices for endorsers upon a dishonored note, had been mailed under cover to one of them, at W. directed to B. where they both resided, it was proposed to prove, that it was the invariable and uniform practice of the endorser's house and counting-room, to which the notices had been directed, to forward such notices immediately upon the receipt of them, and the witnesses who were employed in such counting-room, had no doubt, and believed, from the course of their business, that they had forwarded one of the notices to the other endorser. *Held*, that the proposed evidence was incompetent, to prove the delivery of a notice in due time to the other endorser. *Ib.*
5. No person can become a party to a bill, unless his name appears on some part of it. *Ib.*
6. One whose name is not upon a bill, though interested in it, is not entitled to the benefit of the rule, that each party is entitled to an entire day, for the purpose of giving notice to the person preceding him, on a dishonored note or bill. *Ib.*

PROMISSORY NOTES.—*Continued.*

7. Z. being insolvent, and desirous to raise money, applied to F. and obtained his promissory note for \$250, payable 60 days after date to Z. for the purpose of selling it to raise money. No consideration was paid for the note. Z. endorsed the note in blank, sold and delivered it to the plaintiff, who was ignorant of its being a lent note, for the sum of \$200. The maker of the note was in good circumstances. *Held*, that this note was usurious and void. *Cockey vs. Forrest*, 302.

See EXECUTORS AND ADMINISTRATORS, 7.

REPLEVIN.

1. Where a replevin had been struck off upon the motion of the plaintiff, and an action upon the replevin bond had been instituted, the defendants, (the plaintiff in replevin and his securities) suffered judgment to go by default; they were, notwithstanding, permitted, upon the execution of a writ of inquiry, to assess the plaintiff's damages, to show they had title to the articles replevied, in mitigation of damages. *Belt vs. Worthington*, 155.
2. The object of the law in prescribing that a replevin bond should be entered into by a plaintiff before he should have the writ, was only to indemnify the defendant. The action upon that bond being *sui generis*, ought to be so moulded as best to subserve the principles of justice, having a regard to the rights decided in the replevin, and the nature and character of the bond. *Id.*

SALE.

See EQUITY, 6, 7, 8, 10, 11, 13, 14, 15.

SCIRE FACIAS.

See EXECUTION, 1, 2.

SEAL.

From the earliest period of our judicial history, a scrawl has been considered as a seal. It is not necessary that it should be adopted by the obligor, by a declaration in the body of the bond or single bill, to make it his seal. It is sufficient, if the scrawl be affixed to the bond or bill, at the time of its execution or delivery; and that is presumed, (in the absence of other proof,) from the fact that the obligee is in possession of an instrument, with a scrawl attached to it. *Trasher vs. Everhart*, 145.

SECURITY FOR COSTS.

See EVIDENCE, 13.

SET-OFF.

See EQUITY, 16.

SLANDER.

See FORGERY, 1.

STATUTE OF FRAUDS.

1. E. tenant for life, permitted A. to cut a ditch through her land, to supply his mill with water. Upon the death of E. a verbal agreement was made between the remainder-man and H. for the purchase of the ditch, and the amount of the purchase money was to be ascertained by certain arbitrators. An award being made, H. filed his bill for a performance of this agreement. The defendant's answer

STATUTE OF FRAUDS.—*Continued.*

- admitted the facts, but relied upon the Statute of Frauds as a bar—*Held*, there was no part performance, and the contract could not be enforced. *Hamilton vs. Jones*, 81.
2. The ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is that to withhold relief, would be to suffer a party, seeking to shelter himself under the Statute of Frauds, himself to commit a fraud. *Ib.*

STATUTES.

I. CONSTRUCTION AND EFFECT.

1. The object of the Act of 1825, ch. 167, throughout, is to prevent an accumulation of costs. *Blizzard vs. Jacobs*, 43.
2. Construction of the Acts of 1715, c. 23, and 1765, c. 12. *Hysinger vs. Baltzell*, 99.

II. BRITISH STATUTES.

1. The Statute, 30 Chas. 2, ch. 7, and a part of 4 and 5 Will. and Mary, ch. 24. are in force in this State. They concern the administration of justice, and it has always been understood, that the Judges under the old Government, laid it down as a general rule, that all the statutes for the administration of justice, whether made before or after the Provincial charter, so far as they were applicable, should be adopted. *Sibley vs. Williams*, 37.
2. 5 Geo. 2, c. 7. *Hanson vs. Barnes*, 217.

III. ACTS OF ASSEMBLY.

- 1715, c. 23. *Hysinger vs. Baltzell*, 99.
 1765, c. 12. *Hysinger vs. Baltzell*, 99.
 1785, c. 72. *Carroll vs. Waring*, 304.
 1785, c. 80. *Owings vs. Owings*, 1.
 1794, c. 53. *State vs. Dorsey*, 47.
 1798, c. 101. *Sibley vs. Williams*, 37.
 State vs. Jameson, 274.
 1806, c. 90. *Owings vs. Owings*, 1.
 1815, c. 149. *Owings vs. Owings*, 1.
 1815, c. 173. *State vs. Dorsey*, 47.
 1817, c. 142. *State vs. Dorsey*, 47.
 1820, c. 174. *Sibley vs. Williams*, 37.
 1821, c. 232. *Yates vs. O'Neale*, 158.
 1823, c. 23. *State vs. Dorsey*, 47.
 1825, c. 117. *Diffenderffer vs. Winder*, 189.
 Penn vs. Flack, 224.
 Sothoron vs. Weems, 269.
 1825, c. 167. *Blizzard vs. Jacobs*, 43.

SURETY.

See EVIDENCE, 4.

TAX AND TAX COLLECTOR.

1. The design of the Act of 1815, ch. 173, allowing to collectors, one year after the expiration of the time for which they are appointed, to collect balances due them, was only to give them further time for their own benefit, to collect what they had neglected to collect in due time, in the same manner in which they might have made the collections, within the time prescribed. *State vs. Dorsey*, 47.

TAX AND TAX COLLECTOR.—*Continued.*

2. In an action upon a collector's bond given to secure the collection of taxes, the collector cannot place his defence on the non-delivery, by the clerk of the County Court, to him, of the rate of the assessment and list of taxable inhabitants, unless he states in his plea, that he had applied for the rate and list to the proper officer, and that he either refused or neglected to furnish them. It is the duty of the clerk to deliver the lists at his office, where all his official acts are done, and the collector should apply for them there. *State vs. Scharff*, 59.

See BOND, 4.

LEVY COURT.

TENANCY IN COMMON.

It is an essential attribute of a tenancy in common, that there should be a unity of possession; wherever, therefore, the tenure of the estate intended to be conveyed indicates a holding in severalty, or by particular or specific description, a tenancy in common cannot exist. *Blessing vs. House*, 178.

TENDER.

See DEBTOR AND CREDITOR, 1.

TRESPASS QUARE CLAUSUM FREGIT.

1. F. sold a tract of land to W. reserving the grain then in the ground. This was to be thrashed in the barn, and the straw left for W's use. While the grain was growing, F. sold it to M. who had notice of the first agreement. M. cut the grain and stacked it upon the farm, but afterwards entered upon the premises then in the possession of W. and hauled away the grain in the straw before it was thrashed, thrashed it; and did not return the straw. In an action of trespass *q. c. f.* brought by W. against M.—*Held*, that if the jury believed M's entry was for the purpose of removing the grain and thrashing it off the premises, that it was a trespass *q. c. f.* and the plaintiff might recover damages for that, and the straw which was removed and not returned. *Moats vs. Wiltmer*, 75.
2. Where a party is a trespasser or not, according to the intention with which he enters upon land, then, whether he is a trespasser or not, is a question for the jury exclusively. *Ib.*
3. Acts which amount to trespass *vi et armis*, and which are a component part of one outrage, may be united with a claim for the trespass *q. c. f.* and damages for both recovered in the same action. *Ib.*

TRUSTS AND TRUSTEES.

1. Where trustees act *bona fide* and with due diligence, they have always received the favor and protection of Courts of equity, and their acts are regarded with the most indulgent consideration. Where they have betrayed their trust—grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to rules of strict, if not of rigorous justice. *Diffenderffer vs. Winder*, 189.
2. In a Court of law there is no such head of pleading as trusts. *Green vs. Johnson*, 238.
3. By the common law a *cestui que trust* has no standing in Court. in *propria persona*, he can only assert his rights in a Court of Chancery. *Ib.*

TRUSTS AND TRUSTEES.—*Continued.*

4. Courts of common law, to prevent fraud and injustice, will protect the rights of *cestuis que trust*; but this is done in the exercise of a *quasi* equitable jurisdiction, as where an appeal is made to the justice and discretion of the Court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea. *Ib.*
5. As soon as a trust ceases to be a continuing subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the Act of Limitations begins to run. *Ib.*
6. In a suit in Chancery, by the permanent trustee of an insolvent debtor, it is necessary to show, that the complainant gave bond with surety in that character before filing his bill, and although the allegation in the bill, to that effect, was admitted in an answer by one defendant, yet as respects another defendant, whose answer was silent in relation to that fact, proof of the bond with surety was held requisite. *Stewart vs. Stone*, 318.

See BANKRUPTCY AND INSOLVENCY.

DOWER, 2.

EQUITY, 6, 7, 8, 9, 11, 13, 19.

HUSBAND AND WIFE, 2.

USURY.

1. Upon a plea of usury to an action upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items, the interest as calculated, exceeded 6 per cent. The receipt for the bill, at the foot of the account, stated, that in "case of error either way, should any be discovered," it should be corrected. *Held*, that this was no evidence of an usurious agreement. *Stockett vs. Elliott*, 78.
2. Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction; and that intention, when it can be reached, must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side, and a borrowing on the other, at a rate of interest exceeding six *per centum*, the form given to the transaction is not material; no shift or device can take it out of the Act of Assembly. *Ib.*

See PROMISSORY NOTES, 7.

WAIVER.

See EQUITY, 25.

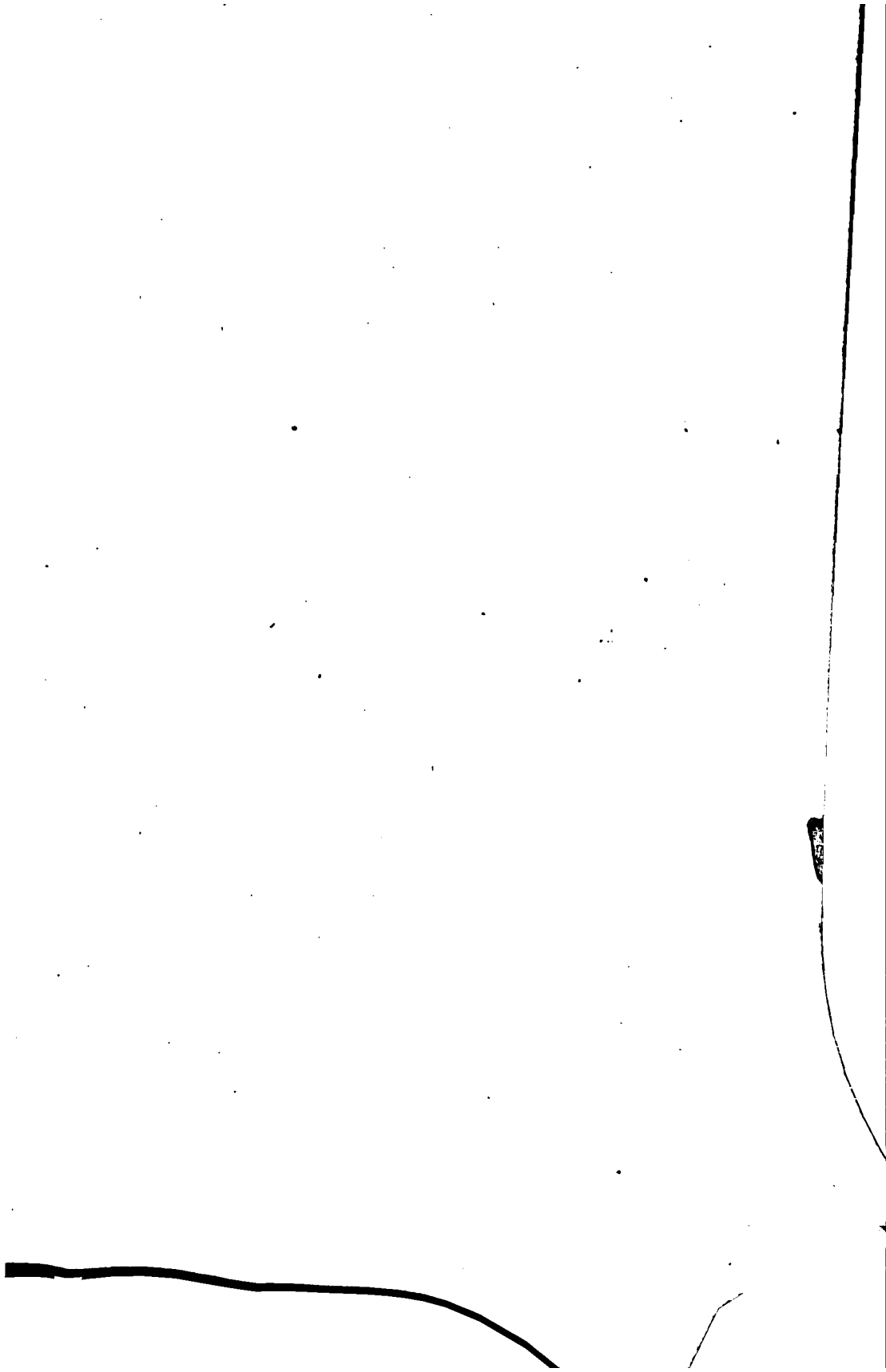
WILLS.

1. It is a general rule in the construction of wills, that a limitation which may operate as a remainder, shall not be construed an executory devise. *Horton vs. Archer*, 128.
2. Where it was *held*, that under a will made before the Act to Direct Descents, certain devisees each took estates tail general, with cross-remainders in fee, under a limitation over to the survivors. *Ib.*
3. It is a general rule, that where there are no particular and sufficient words used for that purpose, surviving shares in a devise of real property will not, upon the decease of one who took as a survivor, survive again. *Ib.*

WILLS.—*Continued.*

4. W. by his last will devised as follows: "I give and bequeath to my daughter A. the sum of \$60, as an annuity, to be paid to her out of the profits of my real estate annually." This is an annuity, and not a rent charge. *Robinson vs. Townshend*, 254.

See EQUITY, 4.



7

Stanford Law Library



3 6105 063 584 358

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW SCHOOL

Stanford Law Library



3 6105 063 584 358

LIBRARY OF THE
WILLIAM STANFORD, JR., UNIVERSITY
LAW SCHOOL